No. 74-1619

In the Supreme Court of the United States

OCTOBER TERM, 1974

SUPREME COURT, U. S.
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FEDERAL POWER COMMISSION, PETITIONER

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question Presented	2
Statement	2
Reasons for granting the writ	5
Conclusion	13
Appendix A, opinion of the court of appeals	1a
Appendix B, judgment of the court of appeals	41a
Appendix C, Opinion No. 623 of the Federal Power Commission	42a
Appendix D, Order denying petition for rehearing of the Federal Power Commission	75a

CITATIONS

Cases:	
Mobil Oil Corp. v. *F.P.C.*, 417 U.S. 282 (1974)	11
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	12
Statutes and regulations:	
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e	8
Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e	8
Federal Power Act, 16 U.S.C. 791a, *et seq*	2, 9
Section 313(b), 16 U.S.C. 825 1(b)	2
Natural Gas Act, 15 U.S.C. 717, *et seq*	2, 9
Section 19(b), 15 U.S.C. 717r(b)	2
Miscellaneous:	
FPC Budget Estimate, Justification to Congress, Fiscal Year 1976	10, 11, 12
FPC 1974 Annual Report to Congress	11, 12

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The Federal Power Commission petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra,* pp. 1a–40a) is not yet reported. The initial opinion (No. 623) of the Federal Power Commission (App. C, *infra,* pp. 42a–74a) and the opinion (No. 623–A) denying rehearing (App. D, *infra,* pp. 75a–76a) are reported at 48 FPC 40 and 48 FPC 371, respectively.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra,* p. 41a) was entered on February 5, 1975. On May 2, 1975, the Chief Justice extended the Commission's time for filing a petition for a writ of certiorari to and including June 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether the Federal Power Commission correctly determined it has no authority to consider coincidentally to the performance of its regulatory functions under the Federal Power Act, 16 U.S.C. 791a, *et seq.* and the Natural Gas Act, 15 U.S.C. 717, *et seq.* evidence that a regulatee is a demonstrated discriminator in its employment relations.

STATEMENT

1. On June 22, 1972, The National Association for the Advancement of Colored People, *et al.* (Petitioners) filed a petition seeking the issuance of a rule by the Commission which would regulate the employment practices of its regulatees. Attached to the petition was a proposed rule dealing with equal employment opportunity in the electric and gas utility industries (34a–40a). Petitioners claimed that the Commission had authority to regulate these matters under various sections of the Federal Power and the Natural Gas Acts, the two acts which the Commission admin-

isters. It was further contended that since there was a national policy against employment discrimination, the "public interest" standard, as used in various sections of these acts, necessarily includes that national policy. Finally, Petitioners urged that the Constitution required the Commission to regulate the employment practices of the regulatees, lest the Commission, due to the extent of its regulation under the acts, become a "partner" in private discriminatory behavior.

On July 11, 1972, the Commission issued Opinion No. 623 which dismissed the petition for lack of jurisdiction (pp. 42a–74a). The Commission believed that it lacked the requisite Congressional authority to promulgate equal employment opportunity regulations concerning the employment practices of those companies which it regulates. The Commission pointed out that there was nothing in the legislative history or the specific sections of either of these acts which would extend its regulatory authority into the internal labor management problems of its regulatees. To the suggestion that the "public interest" standard expanded its jurisdiction into this area, the Commission responded that Congress did not charge it with regulating all matters affecting the public welfare. Rather, the authority of the Commission extended only to those matters which had a "necessary nexus" to its economic regulatory activities or which inhered in the nature of the regulated industries and were thus reflected in the Federal Power and Natural Gas Acts. Finally, with regard to the Constitutional arguments, the Commission found that regulation under these

two acts did not significantly involve the federal government with any alleged discriminatory employment practices of its regulatees.

2. A petition for review was filed by the N.A.A.C.P., *et al.* Upon review, the Court of Appeals disagreed with the Commission's assessment of its jurisdiction and vacated and remanded the orders. The Court distinguished between "two kinds of jurisdiction" in evaluating the limitation of Commission authority. The first type of jurisdiction would be over employment discrimination *per se*—a power to "prescribe personnel practices in detail and to receive complaints, adjudicate them and punish directly infractions of those practices" (App. A, *infra,* p. 7a). The second would be a "power to take into account, in the performance of its regulatory functions, including licensing and rate review evidence that the regulatee is a demonstrated discriminator in its employment relations" (*id.* at p. 8a). The Court concluded that the Commission lacks the former type of authority but possesses the latter.

The Court recognized that the investigation into costs and the allocation of costs associated with employment discrimination was a "potentially quite complex question" (*id.* at p. 27a)[1] but nevertheless hypothesized "costs" could result from employment dis-

[1] The Court also recognized that the Commission staff was completely unfamiliar with the complex questions involving employment discrimination and had absolutely no expertise in this field. The Court acknowledged that the regulation of employment practices might impair the Commission's ability to discharge its express statutory responsibilities (*id.* at p. 9a).

crimination and directed the Commission to consider them in rendering decisions under the Federal Power and Natural Gas Acts.

The Court reasoned that the Commission's primary responsibility in protecting the consumer against exploitation could alternately be described as ensuring that no unnecessary or illegitimate costs would be passed on to consumers. And, the Court found, "[c]osts incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility" (*id.* at p. 25a). The Court also ruled the Commission could deny a license or other similar authorization on the basis of an applicant's record in the area of employment discrimination. The Court reasoned that in the long run economic efficiency could be impaired by the failure to comply with all laws, including employment discrimination laws. From this, the Court concluded that the Commission was authorized to "regulate" employment practices and, to this end, could promulgate appropriate rules.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals extends the regulatory powers of the Commission into areas not intended by Congress to be regulated by the Commission. The Court of Appeals reasoned that inasmuch as the Commission's primary responsibility is to ensure that no unnecessary or illegitimate costs are passed on to consumers, the Commission could regulate "costs incurred by reason of a regulatee's choosing to practice racial discrimination" (App. A, *infra,*

p. 25a). However, merely because employment discrimination may have a "cost" this does not mean that the Commission must regulate employment discrimination. Costs are, of course, in issue in any rate proceeding just as compliance with the laws is a fair consideration in licensing proceedings, but it does not follow that the Commission may regulate the activities which generate those costs or to require affirmative actions before the Commission to comply with laws it is not mandated by Congress to enforce such as the preparation and filing of equal employment programs. Nevertheless, the Court's decision would have the Commission consider employment discrimination in the first instance in determining whether to issue a license or authorize a rate.

For instance, the Court found as proper areas of Commission consideration those parts of the proposed rule providing for the routine filing with the Commission of an EEO–1 statement (*id.* at p. 31a, 38a) and providing for intervention by any person who believes himself subjected to employment discrimination (not one who can demonstrate the costs which have been incurred because of employment discrimination and who will be subjected to those costs), (*id.* at p. 31a, 39a).

Additionally, the Court's decision would require the Commission in ruling on all applications to give material consideration if not by general rulemaking then on a case by case basis (*id.* at p. 33a, note) to the following matters which the proposed rule would require from each regulatee: to establish and file with the Commission a written equal employment opportunity

program (*id.* at pp. 31a, 40a, 36a–38a); to file with all authorization requests a report on the application and effect of a regulatee's employment program upon his employment applications, hiring, and promotions; and to report any employment complaints filed (*id.* at pp. 31a, 40a, 38a). Rather than having the necessary nexus with the Commission's regulatory functions those matters go to the regulation of employment discrimination for its own sake. The Commission believes it is not and should not be required by law to consider these matters. In no way do these matters normally relate to the central functions of the Commission. The Court has confused the consideration of whether to allow certain costs in ratemaking, however incurred, with the consideration and regulation of employment discrimination affecting costs.

Finally, the thrust of the Court's decision is far reaching and potentially burdensome upon the activities of other regulatory agencies who must now seemingly consider evidence of employment discrimination by their regulatees in the first instance without any initial demonstrable showing of cost impact or other impact on operations. Further, if left standing, the decision could be extended for the proposition that a regulatory agency may be required to undertake duplicative regulation in vast areas of business activities which Congress had not intended. Regulation may be required by the decision where the merest thread of interrelationship exists between the activities of the regulatees and the duty of the agencies.

For instance, certainly Congress did not intend this Commission to regulate the area of labor management relations and to collect evidence of a utility's failure to comply with regulations of the National Labor Relations Board or to permit interventions of individuals to provide evidence that the tax laws and Internal Revenue Service regulations regarding withholding of taxes were violated so that the Commission could penalize the utility by lowering its rates if the Commission makes an independent finding the regulations of those agencies have been violated. It is cost evidence which is the proper subject for Commission consideration, but not evidence in the first instance on the question of whether the utility is in compliance with the rules of the NLRB or the IRS.

In this regard, the Court's holding is inconsistent with its finding that Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972,[2] do not require the Commission to concern itself with employment discrimination. Indeed, the Court concluded that Congress specifically desired not to diffuse authority over employment discrimination and accordingly centralized responsibility in the Equal Employment Opportunity Commission (*id.* at p. 21a).

2. The decision of the Court of Appeals, if not overturned, would impose an impractical burden on the Commission and would severely impair the ability of the Commission to discharge its statutory responsibili-

[2] 42 U.S.C. §2000e (1970).

ties under the Federal Power Act, 16 U.S.C. 791a, *et seq.* and the Natural Gas Act, 15 U.S.C. 717 *et seq.* The decision would encourage parties in litigation at the Commission to seek the introduction of a large mass of material and issues unrelated to the Commission's area of expertise and, more importantly, not directly related to utility costs or ability to provide service, but concerned with their compliance with the equal opportunity employment requirements of other laws and other agencies.

The decision below found that there is nothing in either the legislative histories or the specific sections of the Federal Power or Natural Gas Acts which would independently authorize the Commission to regulate the employment practices of its regulatees (App. A, *infra,* pp. 10a–15a). The Court of Appeals also recognized that the staff of the Commission has absolutely no expertise in the field of employment discrimination and that the obligation to regulate employment practices could have a deleterious effect upon the Commission's statutory responsibilities (*id.* at p. 9a). In spite of these findings, the Court *sua sponte* concluded that the Commission is authorized to regulate employment practices (*id.* at p. 26a), and affirmatively required the Commission to consider evidence of employment discrimination either in rulemaking proceedings or at the very least on a case-by-case basis as they are raised (*id.* at p. 33a, note).

If there is nothing in either the legislative histories or specific sections of the Federal Power or Natural Gas Acts which would authorize the Commission to

regulate the internal employment policies of its regulatees, then a court of appeals cannot independently create such authority. If the Commission is to become a forum for the airing of employment discrimination disputes, that necessitates legislation by Congress and not adjudication by a court.

The Court of Appeals erred in judicially extending to the Commission the complex and time consuming burden of regulating employment discrimination that has already been delegated by Congress to other agencies of government by effectively requiring that evidence of employment practices be considered in all Commission proceedings. The Commission has concluded that the timely discharge of its statutory responsibilities as expressly mandated by Congress under the Federal Power and Natural Gas Acts would be severely hampered if in addition it must attempt to comply with the far reaching holding of the Court of Appeals.

The Commission's rate jurisdiction extends to about 200 public utilities selling electric energy at wholesale in interstate commerce under the Federal Power Act. In fiscal year 1974, 2,777 electric rate filings were received and a total of 173 electric rate cases were involved in formal litigation during that period.[3] Commission jurisdiction also applies to approximately 300 hydro-electric licensees. About 109 applications concerning their projects were received during fiscal

[3] FPC Budget Estimates, Justification to Congress, Fiscal Year 1976, pp. 4–6, 4–8.

year 1974,[4] and 25 cases were in litigation during the period.[5]

The Commission's jurisdiction under the Natural Gas Act extends to approximately 6,200 natural gas producers, of which about 100 are large producers each selling by definition more than 10 billion cubic feet per year. These producers filed with the Commission a total of 6,299 rate increases in 224 dockets in fiscal year 1974.[6] Additionally, natural gas producers filed 1,457 certificate and abandonment applications during fiscal year 1974.[7]

Under the Natural Gas Act, the Commission's regulation of national gas producers is no longer accomplished on an individual cost of service basis. Rather, nationwide rate ceilings for wellhead sales have been established and the Commission is not concerned with an individual company's cost of doing business. See *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 282 (1974). If the Commission is required to investigate the employment practices of individual producers the potential burden of reviewing them for the several thousand producers individually would be insurmountable. Moreover, individual review would be wholly incompatible with the framework of the nation-wide or area-wide means of regulating producer rates which have been judicially approved and which are a necessary methodology in the Commission's efforts to alleviate the nation's critical natural gas

[4] *Id.* at pp. 2–6 to 2–9.

[5] *Id.* at pp. 2–14.

[6] FPC 1974 Annual Report to Congress, Table 34, p. 118.

[7] *Id.*, Table 35, at p. 119.

supply shortage. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 755–58 (1968).

The Commission also has certificate and rate jurisdiction over 119 interstate natural gas pipelines. In fiscal year 1974 they filed 300 rate increase applications[8] and 457 certificate applications.[9] A total of 147 pipeline rate cases and 155 pipeline certificate cases were in litigation during fiscal year 1974.[10] The additional burdens of considering evidence of employment discrimination in the litigated cases alone are apparent.

The Commission lacks both the staff and the technical expertise to investigate and quantify the hypothetical costs of employment discrimination which the Court found pertinent to the discharge of the Commission's regulatory responsibilities. For instance, the Commission is not equipped to determine the purpose for which a "strike, demonstration, or boycott" against a regulatee was initiated or to calculate the cost of lost production resulting from these activities (id. at 25a–26a); nor do they relate to the nexus of the Commission's functions. Additionally, the Commission has neither the facilities nor the technical acumen to determine valid "labor costs" for a regulatee due to the elimination from the prospective labor force of those who are discriminated against (*id.* at p. 26a). And, certainly, the Commission possesses no special competence to devise a formula which would measure the economic "costs of inefficiency" in the work force

[8] *Id.*, Table 36, at p. 119.

[9] FPC Budget Estimates, Justification to Congress, Fiscal Year 1976, p. 5–9.

[10] *Id.* at pp. 5–14 and 5–12.

allegedly brought about by the psychological impact of employment discrimination (*ibid.*). Even if the Commission were to collect such data and somehow quantify it, it will be exceedingly difficult to relate this information, in any meaningful way, to its regulatory decisions under the Federal Power and Natural Gas Acts.

In light of the imposition of this onerous and futile burden, the Commission believes that unless the decision is overturned it would be seriously hampered in effectively and responsibly regulating public utilities, licensees, and natural gas companies in the public interest pursuant to the existing congressional mandates of the Federal Power Act and the Natural Gas Act, all to the ultimate detriment of the nation's consumers of electric energy and natural gas.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Federal Power Commission.

JUNE 1975.

I authorize the filing of this petition.

ROBERT H. BORK,
Solicitor General.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1959

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

THE FEDERAL POWER COMMISSION, RESPONDENT

Petition for Review of Order of
The Federal Power Commission

Decided February 5, 1975

Before BAZELON, *Chief Judge*, and MCGOWAN and MACKINNON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MCGOWAN.

MCGOWAN, *Circuit Judge*: This petition for direct review of an order of the Federal Power Commission raises a question as to the precise scope of the regulatory authority vested in that agency by the Congress. It concerns in particular a request made of the Commission, and dismissed by it for lack of jurisdiction, to initiate rule making proceedings in respect of asserted employment discrimination by its regulatees. Because of the confused and contradictory manner in which the important jurisdictional issues involved in this case are presented by all parties to this appeal, we vacate the Commission's order of dismissal, and remand the case for further consideration in light of this opinion.

I

Petitioners are a number of organizations concerned with advancing the interests of black, Spanish surnamed, native, and female Americans. Charging widespread discrimination in the employment of these groups by natural gas and electric utility companies, they petitioned the Commission for "the issuance of a rule requiring equal employment opportunity and nondiscrimination in the employment practices of its regulatees," [1] and attached to their petition a "proposed rule," which we append to this opinion. We recount its operative provisions.

Section 2 declares that equal employment opportunity will be considered an element of the "public interest," a

[1] Petition of NAACP, et al; FPC Docket No. R-447, JA 1.

criterion by which the Commission must make many of its rate making and licensing decisions. Section 3 details the substantive duties of regulatees not to discriminate in any employment practice on the basis of race, color, religion, sex or national origin. Sections 4 and 5 impose on regulatees the duty to devise and to implement affirmative "equal employment opportunity programs," the general purpose of which is to involve every regulatee in a "continuing campaign to exclude every form of prejudice or discrimination . . . from its personnel policies and practices," and the specific contents of which are to include such measures as the active recruitment of minority and female employees through advertisement in media having significant circulation among those groups, the avoidance of selection techniques and tests that have the effect of disadvantaging minority groups and females, and the publication to the regulatee's management staff and employees of a rigid anti-discrimination policy.

Section 6 of the proposed rule requires each regulatee to file annually with the Commission a copy of the "EEO-1" form which it already must file annually with the United States Equal Employment Opportunity Commission. Section 7 makes it a necesary part of each regulatee's application for a rate change, license or other necessary Commission approval that a report be submitted on the nature and success of the regulatee's affirmative "equal employment opportunity program" and on any complaints of employment discrimination that have been made against the regulatee. Section 9 obligates the Commission to entertain individual complaints of employment discrimination by regulatees, and to conduct hearings and issue decisions and orders pursuant to its existing procedural regulations.[2]

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[2] Such of those complaints as claim violations of any provision of Title VII of the Civil Rights Act of 1964 may be referred to the Equal Employment Opportunity Commission.

The proposed rule's section 10 authorizes intervention by complainants of employment discrimination in any rate making or licensing proceeding involving the regulatee complained against. Section 11 reinforces section 2, described above, by specifying that a regulatee's record of compliance with the proposed rule will be given "material consideration" by the Commission when it passes on any request by that regulatee for a rate change, license, or other necessary Commission approval, with Commission action on such requests being denied or conditioned accordingly. Section 14 imposes, for violation of the proposed rule, the usual $500-a-day fine for violation of Commission rules.

The response of the Commission was to treat the petition for rule making as one for a declaratory order, and to issue such an order, the substance of which was a refusal to initiate the requested rule making on the ground that the Commission had "no jurisdiction to adopt such a rule." [3] When they requested a rehearing by the Commission, petitioners appended a letter supporting their position from the Chairman of the Equal Employment Opportunity Commission, *id.* at 90, which agency

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[3] JA 56, 77. We note in passing that there is some uncertainty as to what exactly is before us for review. We are confronted with what is styled a declaratory order, though why the Commission thought this the proper medium through which to assert a jurisdictional barrier to the requested rule making is not clear to us. The procedural waters have been further muddied by the wording of the Commission's formal order, which dismissed the petition "as described above," *id.* at 77, the Commission having treated the petition as one for a declaratory order. It might therefore be said that what we are confronted with is not even a declaratory order refusing to initiate rule making, but a declaratory order refusing to issue a requested declaratory order. We pass over these ambiguities, however, preferring to treat the Commission as having done exactly what in substance it did do, namely, to refuse on jurisdictional grounds to initiate the requested rule making.

has also filed an *amicus* brief with this court. The Comcission denied the petition for rehearing as "setting forth no new facts or principles of law," *id.* at 93, and the way was thus cleared for this direct review proceeding.

A close analysis of the procedural posture of this appeal reveals a double ambiguity. By requesting "*a rule* requiring equal employment opportunity and nondiscrimination in . . . employment practices," the petitioners left unclear whether they were asking for their proposed rule and no other, or merely for a rule making proceeding on the subject of employment discrimination generally, with the proposed rule perhaps serving only as a model or point of departure. By asserting its lack of jurisdiction to adopt "*such a rule*," the Commission in turn left unclear which of these requests it was denying its jurisdiction to grant. We do not know whether its order asserted a lack of jurisdiction to adopt (1) the specific proposed rule, or (2) *any* rule relating to employment discrimination by regulatees.

The ambiguity is unfortunately not resolved by examining the positions taken by the parties in the record and in their briefs. In their petition for rule making, petitioners first proposed the adoption of "a rule" relating to employment discrimination, but then went on to ask the Commission more expansively to "[p]rescribe *regulations* prohibiting discrimination . . . and assuring equal opportunity in the employment practices of its regulatees." (Emphasis added.) *Id.* at 3. The Commission's opinion denying the rule making petition, although it devoted considerable attention to the jurisdictional problems raised by certain aspects of the proposed rule in particular and concluded by denying its jurisdiction to adopt "such a rule," stated at an earlier point that "[t]he Commission lacks the legal authority to promulgate equal employment opportunity *regulations* . . . because its lacks the requisite delegation of Congressional

authority to act *in that area*." (Emphasis added.) *Id.* at 57, 75-77.

The confusion persists in the briefs filed in this court. In footnote 87 (at p. 54) of their brief, petitioners respond to the Commission's objections to particular aspects of the proposed rule, one such objection being that it would result in public disclosure of information protected from such disclosure by the Civil Rights Act. The petitioners' answer that "[w]e are confident that sufficient expertise and competence exists at the Commission to devise a rule against employment discrimination that would be effective and in harmony with other laws and regulations," suggests that petitioners do not view themselves as having asked for and been denied a specific proposed rule but rather rule making in general. On the other hand, they conclude their brief in this court by asking "that the Federal Power Commission be directed to proceed with utmost dispatch in *issuing the rule requested*." (Emphasis added.) *Id.* at 54, 68-69.

Similarly, the Commission in its brief (at 3-4) states in one sentence that it "dismissed the petition for lack of jurisdiction to adopt the requested rule," and in the next sentence states that it "denied the requested relief because, in its view, it lacked the requisite Congressional authority to promulgate equal employment opportunity regulations. . . ." Further, there are internal contradictions in the Commission's brief. It states the issue to be whether it has any jurisdiction, in the course of discharging its regulatory responsibilities, to take the existence of proven employment discrimination into account, and broadly argues that it does not. However, at one point in its brief (at 30) the Commission says:

> . . . [I]t will suffice to say that no costs can be passed on to the ultimate consumer without the approval of the Commission. If any party wishes to challenge the propriety of certain costs, *e.g.*, those

> incurred through discriminatory employment practices, he is free to intervene and make his position known in the appropriate rate proceeding.

It is obvious that a concession of this kind is not compatible with any flat statement that the Commission has no authority to consider the fact of employment discrimination in its public interest determinations.

In its *amicus* brief the EEOC states the "Question Presented" as that of

> Whether the Federal Power Commission in exercising its public responsibilities has the authority to consider the discriminatory employment practices of its regulatees, or whether it must ignore such discrimination on the basis of Race, sex, or national origin, no matter how blatant or wide-spread?

It indicates generally in its brief that the issue is whether the FPC has jurisdiction to adopt *some* rules relating to employment discrimination, stating at one point (at 4-5) that "we do not argue that the Power Commission is required to consider every complaint of discrimination against a utility which it regulates . . . [but only that it cannot] ignore widespread general discrimination. . . ."

It is possible that the parties are closer together than they think. Whether this is true or not, the case is before us on representations by both sides which, on close analysis, suggest that the parties may be talking past each other. We cannot ignore the fact that this confusion exists, for it is crucial to our disposition, as will become clear from the discussion hereinafter of the apparent boundaries of the Commission's jurisdiction. From this point forward it is important to distinguish between two kinds of jurisdiction: One—to which the proposed rule extends—embraces power on the part of the Commission to prescribe personnel practices in detail and to receive complaints, adjudicate them, and punish directly infractions of those practices. The other—which

even the Commission appears to contemplate may exist—is power to take into account, in the performance of its regulatory functions, including licensing and rate review, evidence that the regulatee is a demonstrated discriminator in its employment relations.

II

Petitioners assert first a statutory and then a constitutional basis for their claims of broad Commission jurisdiction over the employment practices of regulatees.[4] We shall consider these in the same order, concluding that the Commision is neither empowered nor required to adopt the rule as proposed, but that it does possess jurisdiction of the more limited kind conceded by it in its brief.

There is one preliminary observation to be made. In arguing for their proposed rule, petitioners emphasize the great importance of the fight against employment discrimination. While reiterating our belief in that importance, we must also note the limited relevance of that belief to this appeal. For one thing, Congress need not be accused of slighting the importance of achieving equal employment opportunity merely because of a decision

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[4] Petitioners' brief contains a third section in which arguments are made that (1) no other federal law "preempts" the Commission from acting to proscribe employment discrimination by regulatees and (2) the Commission's doing so would effectively promote the national policy against such discrimination. Br. 45-54. A claim of "preemption," if it is at all distinct from the assertion that statutory authority is simply lacking, adds only the notion that such authority might once have existed and been withdrawn. In fact no such distinct contention appears to have been made by the Commission, and, accordingly, we do not treat the matter separately. Neither do we treat separately the alleged potential efficacy of the Commission in combatting employment discrimination, of which the only apparent relevance to this appeal is the possible inference that Congress should not be considered to have eschewed the use of so powerful a weapon.

on its part that this task is not one it chose to assign to the Federal Power Commission. There are good reasons why Congress might have reached such a decision. The goal itself might have been thought better served by centralizing responsibility for its achievement (in the Justice Department and the Equal Employment Opportunity Commission, for example) rather than by diffusing it among many and thus suffering a loss in the degree of accountability and a gain in the number of jurisdictional overlaps and conflicts.

More important, Congress may have felt that other significant goals would be inadequately served if the attentions of the agencies set up to pursue them were divided. The Commission's principal task of passing on statutorily specified license and rate applications is prodigious.[5] To perform it, a staff has been built up of specialists in the technical aspects of gas and electric power production and distribution. The unfamiliar problems of employment discrimination regulation might divert an inordinate amount of their energies and skills from the ends to which these are most productively applied.

This discussion of the merits of combining in one agency the responsibilities for insuring efficient power pro-

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[5] The dimensions of the task are suggested by a partial list of applications to, and actions by, the Commission during fiscal 1973: 56 wholesale electric rate increase applications; 11 electric company sale and consolidation applications (all disposed of), 75 electric company securities issuance applications (all disposed of); 116 electric power project license and permit applications (90 disposed of, leaving 529 pending); 215 pipeline rate increase applications; 280 pipeline construction certificate applications (212 disposed of, leaving 214 pending); 6,844 gas producer rate increase applications; 1,383 gas producer certificate applications (955 disposed of, leaving 2,059 pending); 216 gas producer abandonment applications (171 disposed of, leaving 287 pending). FPC, 1973 ANNUAL REPORT 19, 20, 41, 56, 58, 59, 60 (1973).

duction and for curtailing employment discrimination is obviously much abbreviated. We do not prolong it, however, for the reason that, beyond assuring ourselves that it would not be unreasonable for Congress to divide these responsibilities or to allocate their sharing in differing manners and proportions, we are not concerned with why Congress may have done so, but whether it did; and to that question we now turn.

A. *The Relevant Statutes.*

1. *Federal Water Power Act.*

The Commission was first brought into being by the Federal Water Power Act of 1920.[6] The principal powers delegated to it by that Act, along with the stated criteria for their exercise, are as follows: to issue licenses, with appropriate conditions, for "necessary or convenient" navigation and power projects on Federal waterways;[7] to recommend that "the development of any water resource for public purposes . . . be undertaken by the United States itself," refusing to renew existing licenses on that account;[8] to require modification of proposed projects in order to effect a "comprehensive plan" for the use of Federal waterways in commerce, power generation, and "other beneficial public uses, including recreational purposes";[9] to regulate the operation of licensed projects "for the protection of life, health, and property";[10] in the absence of state regulation, to regulate security issuances by licensees, and also to set "reason-

[6] 41 Stat. 1063 (June 10, 1920), *as amended* 16 U.S.C. §§ 791-823 (1970).

[7] 16 U.S.C. §§ 797(e), 799, 817 (1970).

[8] *Id.* §§ 800(b) and (c), 807.

[9] *Id.* § 803(a).

[10] *Id.* § 803(e).

able, non-discriminatory, and just" rates for interstate sales of power from licensed projects.[11]

On its face, the Act thus displays a primary congressional concern for the orderly and coordinated development of water resources, and also for interstitial Federal regulation of the sale of power derived therefrom. Otherwise, the only expressed concern with the internal operations of licensees relates to health and safety features of licensed projects. Broad references to the "public interest," on which petitioners place such great emphasis, are rare in the Act. Where they do occur, moreover, they strongly suggest by their contexts that what is meant is not the public interest generally, but the public's interest in the optimal use of the waterways. Thus, Section 4 requires that contemplated improvements in waterways be "desirable and justified in the public interest *for the purpose of improving or developing a waterway* . . . (emphasis added)."[12]

The legislative history of the Act holds few surprises. It reveals a Congress whose attention was steadily fixed upon two principal objectives: to exploit the hydro-electric resources of a nation that even then was energy-deficient,[13] and to substitute for its earlier piecemeal approach to the problem a method of comprehensive planning which would accomplish, among other things, the conservation of natural resources.[14]

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[11] *Id.* § 813.

[12] *Id.* § 797(e). *See also id.* §§ 797(g), 800(a).

[13] *See* H. R. REP. NO. 61, 66th Cong., 1st Sess. 4-5 (1919); S. REP. NO. 180, 66th Cong., 1st Sess. 2-3 (1919).

[14] *See* H. R. REP. NO. 61, supra note 36, at 2-3; Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 613 (2d Cir. 1965). *See also* Udall v. FPC, 387 U.S. 428 (1967).

2. *Federal Power Act.*

The Commission's authority was substantially broadened by the Federal Power Act, enacted as Title II of the Public Utility Act of 1935.[15] Among its newly delegated powers were the following: to order such interconnections of electric power transmission facilities, setting such terms and conditions for the same, as are "necessary or appropriate in the public interest";[16] to approve such asset sales and consolidations of interstate electric power companies as are "consistent with the public interest";[17] to approve such securities issuances by those companies as are "compatible with the public interest" and "consistent with the proper performance of service . . . as a public utility";[18] to determine "just and reasonable" rates for interstate sales and transmissions of electric power;[19] and to order that "proper, adequate or sufficient" interstate power service be rendered.[20]

The Act's preamble echoes the generality of the foregoing quoted phrases, declaring that the sale and transmission of electric power are "affected with the public interest," federal regulation of interstate aspects being "necessary in the public interest."[21] The statute itself nowhere defines the "public interest," but instead leaves the precise ambit of the Commission's concern uncertain. Of the Commission's primary task there is no doubt, however, and that is to guard the consumer from exploita-

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[15] 49 Stat. 803, 838 (Aug. 26, 1935), *as codified* 16 U.S.C. §§ 824-25 (1970).

[16] 16 U.S.C. § 824(a) (1970).

[17] *Id.* § 824(b).

[18] *Id.* § 824(e).

[19] *Id.* § 824(f).

[20] *Id.* § 824(f).

[21] *Id.* § 824(a).

tion by non-competitive electric power companies. The Act itself speaks of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy." [22] It was passed in conjunction with the Public Utility Holding Company Act of 1935, whose stated policy was to undo the effects of the holding companies' exercising undue control over the power industry, one of these effects being excessive charges to subsidiaries because of "an absence of arm's-length bargaining [and] restraint of free and independent competition." [23] Congress's central concern with exploitation is of course reflected in the statute's emphasis on just and reasonable prices, as well as by its frequent references to the financial and accounting aspects of electric company operations.[24] The legislative history of the Act adds little to our understanding. It reveals that Congress's goal was, once again, the "planned coordination of the facilities of the industry which alone can produce an abundance of electricity at the lowest possible price." [25]

3. *Natural Gas Act.*

The Natural Gas Act of 1938 [26] further empowered the Commission, in part: to approve imports and exports of natural gas unless it finds that these "will not be in

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[22] *Id.* § 824(a). *See also id.* § 825(s) (government-produced power to be disposed of "in such a manner as to encourage the most widespread use thereof at the lowest possible rates to consumers").

[23] Public Utility Holding Company Act of 1935 § 1(b)(2), 15 U.S.C. § 79a(b)(2) (1970).

[24] *See* 16 U.S.C. §§ 824g, 824h(b), 825(a), 825a, 825c, 825h.

[25] S. REP. No. 621, 74th Cong., 1st Sess. 17 (1935).

[26] 52 Stat. 821 (June 21, 1938), *as codified*, 15 U.S.C. § 717 *et seq.* (1970).

the public interest";[27] to set "just and reasonable" rates for the interstate transportation and sale of natural gas;[28] to order such expansions and interconnections of natural gas transportation facilities as are "in the public interest" and do not impose an "undue burden";[29] to disallow abandonments except as the "public convenience and necessity permit[s]";[30] and to license interstate transportation and sale of gas by reference to the "public convenience and necessity."[31]

As in the case of the Federal Power Act, the statute's preamble declares that interstate gas operations are "affected with a public interest" and must "in the public interest" be regulated, but leaves the exact content of these terms in doubt. Again, however, there is no question that the exploitation of the gas consumer was uppermost in Congress's mind. The statute begins with a reference to certain reports made by the Federal Trade Commission, the central conclusion of which had been that anticompetitive practices and overconcentration of control in the natural gas industry were leading to the payment of excessive prices by the consumer.[32] The statute evinces the same concern for "just and reasonable" rates as does the Federal Power Act, with an added preference for decreasing rather than increasing those rates,[33] and

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[27] 15 U.S.C. § 717b (1970).

[28] *Id.* § 717c and d.

[29] *Id.* § 717f(a).

[30] *Id.* § 717f(b).

[31] *Id.* § 717f(e).

[32] *See* Federal Trade Commission, FINAL REPORT TO THE SENATE PURSUANT TO S. RES. NO. 83, 70th Cong., 1st Sess. S. DOC. NO. 92, Pt. 84-A, 70th Cong., 1st Sess. (1936) at 581-617; FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944).

[33] The Commission may decrease but not increase rates on its own motion. 15 U.S.C. § 717d (1970).

there is the same frequency of reference to the financial and accounting aspects of gas company operations.[34]

The elements of the "public interest" are never detailed in the congressional debates and reports, but there are innumerable references to the problem of consumer exploitation.[35] Indeed, the Act as originally passed stated its primary concern with this problem in as many words:

> . . . [I]t [is] the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.[36]

The quoted passage was lost to later amendments, but these were not intended as revisions either of Congress's objective or of the Commission's charter.[37]

B. *FPC Regulation of Employment Discrimination Per Se.*

The more extensive of the two kinds of jurisdiction described above—that consistent with the adoption of the petitioners' proposed rule—would in our view necessarily entail a power on the Commission's part to regulate employment discrimination *per se*, a power, in other words, to act to curtail employment discrimination merely for the sake of seeing that practice curtailed. The Commission could only have such power, of course, if the cur-

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[34] *See* 15 U.S.C. §§ 717h, 717, 717m(b), 717o, 717p(b).

[35] *See* S. REP. No. 1162, 75th Cong., 1st Sess. (1937); H. R. REP. No. 709, 75th Cong., 1st Sess. (1937); 81 Cong. Rec. 6720-33, 9314-17 (1937).

[36] Natural Gas Act § 7(c), 52 Stat. 821, 825 (1938) *as amended*, 15 U.S.C. 717f (1970).

[37] Act of Feb. 7, 1942, 56 Stat. 83 (1942), as codified 15 U.S.C. § 717f(c)-(h). *See also* H. R. REP. No. 1290, 77th Cong., 1st Sess. (1941).

tailment of employment discrimination were itself among the Commission's statutorily defined objectives. To judge the validity of the proposed rule, therefore, we must first ask whether the Congress did indeed entrust to the Commission this particular responsibility.

Judicial precedent suggests that the Commission's responsibilities are limited to those that we have identified above in discussing the statutes and their histories. The courts have, for example, described the Federal Water Power Act as "the outgrowth of a widely supported effort on the part of conservationists," *Scenic Hudson Preservation Conference v. FPC*, 334 F.2d 608, 613 (2d Cir. 1965), and have stated that a "major purpose of the whole [Federal Power] Act is to protect consumers against excessive prices." *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952). It has been said that the Commission's task under the Natural Gas Act is to effect "a balancing of the investor and the consumer interests," on the one hand, to see that "the return to the equity owner [is] sufficient to maintain confidence in the financial success of the enterprise, so as to maintain its credit and attract capital," and, on the other, to "protect consumers against exploitation at the hands of natural gas companies." *FPC v. Hope Natural Gas*, 320 U.S. 591, 603, 610 (1944).[38]

A concise description of the principal objectives of Commission activity must therefore be the following: first, to oversee the orderly development of water power and other natural resources, and, second, to bring about the production of power in the greatest possible quantity and at the lowest possible cost to the consumer in the long run—in the economist's terms, to insure the efficient performance of an industry in which the normal forces

[38] *See also* Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 388 (1959) ("purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumer").

of competition are for one reason or another not equal to the task.[39]

Petitioners maintain, however, that the Commission may properly concern itself with employment discrimination *per se* under the statutory command to the Commission to regulate "in the public interest," and by similar vague criteria. We turn, then, to the question of the proper interpretation of these criteria, and thereafter to a consideration of whether our views are consistent with prior decisions of analogous questions of agency jurisdiction.

1. *The "Public Interest."*

The Supreme Court has stated that the words "public interest" do not constitute a "mere general reference to the general welfare, without any standard to guide determinations." Rather the Court, in interpreting the Interstate Commerce Act, insisted that "the term 'public interest' . . . has direct relation to the adequacy of transportation service, to its essential conditions of economy and efficiency, and appropriate provision and best use of transportation facilities . . . ." *New York Central Securities Co. v. United States*, 287 U.S. 12, 24 (1932).

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[39] A particularly lucid elaboration of this latter function was given by Judge Wright in Northern Natural Gas v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968):

> . . . [The] basic goal of direct governmental regulation through administrative bodies and the goal of individual government regulation through the antitrust laws is the same—to achieve the most efficient allocation of resources. For instance, whether a regulatory body is dictating the selling price or that price is dictated by a market free from unreasonable restraints of trade, the desired result is to establish a selling price which covers costs plus a reasonable return on capital . . . .

See also Lynchburg Gas Co. v. FPC, 336 F.2d 942, 949-50 (D.C.Cir. 1964).

As was succinctly said in *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944), also involving the powers of the Interstate Commerce Commission, its primary statutory objective of insuring efficient transportation service is "the Commission's guide to the public interest." *Id.* at 82.

We ourselves noted in *Alabama Electric Cooperative Inc. v. SEC*, 353 F.2d 905, 907 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 968 (1966), that

> "[w]ords like 'public interest' . . . , though of wide generality, take their meaning from the substantive provisions and purposes of the Act."

And in a recent case where the jurisdiction of the FPC in particular was at issue, we declared that:

> A particular statute may have such a setting that, on consideration of its legislative history, the nature of the agency, and breadth of responsibility involved, and other material factors, a court may come to the conclusion that though its public interest language is broad its meaning in context warrants a relatively restricted reading.

City of Lafayette v. SEC, 454 F.2d 941, 948 (D.C. Cir. 1971), *aff'd sub nom. Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973).[40]

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[40] *See also* National Broadcasting Co. v. United States, 319 U.S. 190, 216, 219 (1943) (FCC not empowered by "public interest" criteria to act upon "generalities unrelated to the living problems of radio communication"); Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933) ("public interest" to be interpreted in light of "its context . . . the nature of radio transmission and reception, [and] . . . the scope, character, and quality of service"); Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968) ("Especially with First Amendment issues lurking in the background, the 'public interest' is too vague a criterion for administrative action unless it is narrowed by defineable standards."), *cert. denied*, 396 U.S. 842 (1969); City of

We must conclude, therefore, that Congress has not charged the Commission with advancing *all* public interests, but only the public's interest in having the particular mandates of the Commission carried out, its interest, in other words, in the conservation of natural resources and the enjoyment of cheap and plentiful electricity and natural gas.

2. *Related Jurisdictional Issues.*

a. *The FPC and Antitrust Considerations.*

Much is made by petitioners of our numerous holdings that the Commission may, and in some cases must, take into account the anticompetitive activities of regulatees as well as the anticompetitive effects of proposed Commission actions. *See, e.g., City of Lafayette* v. *SEC, supra; Northern Natural Gas Co.* v. *FPC*, 399 F.2d 953 (D.C.Cir. 1968); *City of Pittsburgh* v. *FPC*, 237 F.2d 741 (D.C.Cir. 1956).[41] These do not, however, establish that the content of the "public interest" criterion is generally supplied by other national policies and laws. *Some* such policies and laws are surely relevant, but not simply because they exist. They are relevant because their objectives "can be related to the objectives of the statute administered by the agency." *City of Chicago* v. *FPC*, 385 F.2d 629, 635 (D.C.Cir. 1967). Recalling the primary objectives of the Commission as we have described

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Chicago v. FPC, 385 F.2d 629 (D.C. Cir. 1967) (agency may consider congressional objectives expressed in other legislation "assuming they can be related to the objectives of the statute administered by the agency"), *cert. denied*, 390 U.S. 945 (1968).

[41] *See also* Denver & Rio Grande Western R. Co. v. United States, 387 U.S. 485, 492-493, (1967); California v. FPC, 369 U.S. 482, 484-485 (1962); United States v. Borden Co., 308 U.S. 188, 198-199 (1939); Lynchburg Gas Co. v. FPC, 336 F.2d 942, 946, 949-950 (D.C. Cir. 1964); Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230, 235 (D.C. Cir. 1951), *aff'd.* 343 U.S. 414 (1952).

them above, one would be hard put to think of a matter of more direct and proper concern to the Commission than the state of competition in the regulated industry. By doing whatever is within its power to enhance that competition, the Commission serves the same objective as it does by direct regulation of price: indeed, Commission decisions affecting the structure of the power industry could scarcely be made rationally without regard to the impact they will have on the competitive climate.

If express statutory authority to consider antitrust policies were needed, moreover, it would not be lacking. Although the Commission is nowhere empowered to enforce the antitrust laws as such,[42] it is authorized by the Natural Gas Act to transmit evidence of apparent violations of those laws to the Attorney General. 15 U.S.C. § 717s(a) (1970). The Federal Water Power Act specifies, moreover, that project licenses are to be issued by the Commission with the condition that:

> Combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

16 U.S.C. § 803(h) (1970). *See also Northern Natural Gas* v. *FPC*, 399 F.2d 953, 959-60 (D.C.Cir. 1968).

b. *The FPC and Environmental Considerations.*

It has also been held that environmental considerations are the proper concern of the Commission. *See, e.g., Udall* v. *FPC*, 387 U.S. 428 (1967); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965). But, as we have seen, the Commission's explicit mandate includes the preservation as well as the exploita-

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[42] *Compare* 15 U.S.C. § 21(a) (1970) (enumerating other agencies empowered to enforce the Clayton Act).

tion of water resources, the Water Power Act of 1920 having been "the outgrowth of a widely supported effort on the part of conservationists." *Scenic Hudson Preservation Conference* v. *FPC*, *supra* at 613. The Act itself instructs the Commission to consider the "recreational purposes" to which water resources might be put. 16 U.S.C. § 803(a) (1970). Finally, environmental considerations have been expressly made the business of all Federal agencies by the National Environmental Policy Act of 1970. *See* 42 U.S.C. § 4332(A)-(H) (1970); *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

It is convenient at this point to mention Title VII of the Civil Rights Act of 1964 and the Equal Employment Opportunity Act of 1972,[43] counterparts of NEPA in the field of employment discrimination. In thus specifically legislating in the area of equal employment opportunity, Congress did not in our view curtail any agency's existing authority in that area, but there are several other things it did not do. It did not, in the manner of NEPA, explicitly enjoin every federal agency to concern itself with employment discrimination; to the contrary, it centralized responsibility for such matters in the Equal Employment Opportunity Commission. Strong evidence of Congress's specific desire not to diffuse authority over employment discrimination among federal agencies other than the EEOC is also found in section 604 of Title VI of the Civil Rights Act of 1964.[44] All federal agencies are directed by that Title to administer contracts and subsidies in such a way as to insure that discrimination is not practiced "under any program or activity receiving Federal financial assistance." Section 604 provides, however, that:

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[43] 42 U.S.C. § 2000e (1970).

[44] 42 U.S.C. § 2000d *et seq.* (1970).

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. 2000d-3 (1970).

c. *The FCC and Employment Discrimination.*

Our attention is directed to the fact that the Federal Communications Commission has adopted regulations governing the employment practices of its regulatees. *See* 47 CFR §§ 21.307, 76.311. While the validity of these regulations is not now, and appears never to have been, before us, that issue is in any case readily distinguishable from the one that is.

We have specifically recognized the responsibility of the FCC to guard against racially discriminatory programming. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). The FCC has reached the conclusion that a broadcaster's programming will inevitably fail fairly to reflect the tastes and viewpoints of minorities if those minorities are systematically excluded from the broadcaster's employ.[42]

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[42] The FCC in its Memorandum Opinion and Order and Notice of Proposed Rulemaking on this matter stated in part that:

> A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public. Thus, it immediately raises the question of whether he is consulting in good faith with Negro community leaders concerning programming to serve the area's needs and interests. Indeed, the very fact of discriminatory hir-

This is a far different question from the one involved in the appeal before us. The FPC is expressly charged with proscribing any discrimination, including, of course, racial discrimination, in the services that its regulatees render to the public. 15 U.S.C. §§ 717c(b) and d(a); 16 U.S.C. §§ 824d(b) and e(a) (1970).[46] But the likelihood that racial discrimination in employment might work its way into the provision of those services seems to us a slight one. More important perhaps, we would expect such service discrimination to be far more easily identified and remedied than is true of discrimination in programming, which might be so subtle and unsusceptible of direct remedy as to require the eradication of its root cause.

d. *Other Agenices and Employment Discrimination.*

Petitioners cite several other instances of agency action to curb employment discrimination by regulatees. The Securities and Exchange Commission in 1971 issued a release which called attention to existing requirements that registrants disclose on appropriate SEC forms the pendency of civil rights proceedings which could affect their business activities. In thus acting, however, the SEC appears to us merely to have been fulfilling its proper role of seeing that investors are fully informed of circumstances which might bear on the financial pros-

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ing policies may effectively cut the licensee off from success in such efforts.

33 F.R. 9960, 9962 (1968).

[46] It is to this specific statutory instruction to prohibit service discrimination by regulatees, rather than to the "public interest" standard, that the Commission points as support for its regulation of discrimination at recreational facilities at hyrdoelectric facilities. Br. 29; Order No. 341, 37 FPC 775 (1967).

pects of securities-issuing corporations. A corporation's involvement in civil rights litigation may constitute such a circumstance, as may its involvement in any other kind of litigation. Indeed, the SEC release in question was only partly directed at disclosure of pending civil rights proceedings; it also called attention to the existing requirement that registrants disclose the pendency of suits against them under federal environmental protection laws. *See* SEC Securities Act Release No. 5170 & Exchange Act Release No. 9252 (1971).

We note also that the SEC has expressly declined to promulgate rules concerning employment discrimination by regulatees, reasoning that "[a]lthough . . . the Commission may act to assure that regulated entities do not follow practices (including employment practices) that may prove inimical to the investing public or . . . other elements of the Commission's concern," it has not been adequately shown "what the impact of such practices might be on the investing public and our capital markets." 39 Fed. Reg. 2809, 2810 (1974). *See also* 37 Fed. Reg. 28,767 (1972).

The Interstate Commerce Commission and Civil Aeronautics Board have each given notice of proposed rulemaking on the subject of employment discrimination by regulatees, but neither agency has taken any further action. *See* 36 Fed. Reg. 10,741 (1971); 37 Fed. Reg. 15,518 (1972). Of the Federal Home Loan Bank Board's regulations governing the employment practices of regulated banks, 12 C.F.R. § 528.7 (1974), it suffices for the moment to say that their validity is not an issue in this appeal.

C. *FPC Regulation of Employment Discrimination Coincidentally to Proper Commission Concerns.*

The foregoing suggests our inability to find that Congress intended for the Commission to entertain and to

adjudicate individual complaints of employment discrimination by its regulatees, and to impose sanctions unrelated to the performance of its central regulatory purposes. At the same time we cannot state flatly that the Commission may never "regulate" employment discrimination, if by that it is meant that such discrimination can never figure in the Commission's regulatory calculations. We can foresee situations in which consideration by the Commission of a regulatee's discriminatory employment practices, including rules governing the invocation of that consideration, could be reasonably related to the pursuit of the Commission's proper objectives. We therefore conclude that the Commission does have jurisdiction over employment discrimination in the narrower sense described at the outset of the discussion.

The Commission's task in protecting the consumer against exploitation can be alternatively described as the task of seeing that no unnecessary or illegitimate costs are passed along to that consumer. Costs incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility. Without attempting an exhaustive enumeration of such costs, we identify at least the following as indicative of those arguably within the Commission's range of concern: (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination,[47] (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because

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[47] *See* Exec. Order No. 11,246 3 C.F.R. 169 (1974) (all contracts with federal government to include private contractor's promise not to discriminate in employment; contracting government agencies to cancel for breach of such promise).

of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion.

Obviously such costs of employment discrimination range from the very definite and easily ascertainable to the very questionable and virtually unquantifiable. The problem of how to see that they are not borne by the consumer could arise in any number of different regulatory contexts, including both rate and certificate proceedings. We therefore do not attempt to detail all the various ways the Commission may thus "regulate" employment discrimination, leaving this in the first instance to the Commission itself.

A regulatee's performance in the area of equal employment opportunity may also be relevant to that company's efforts to secure a license renewal or other Commission authorization. It is conceivable that an applicant's record could be so riddled with discrimination-related legal difficulties, and its future so lacking in any promise of improvement on that score, that the Commission could validly conclude that for this reason it should not be permitted to be the recipient of franchise grants. In the long run, after all, the most efficient, lowest-cost production and distribution of electricity and natural gas will be that which is conducted in compliance with the laws, employment discrimination laws and other laws alike.

Moreover, the Commission is not necessarily confined to consideration of employment discrimination in successive adjudicatory proceedings. There are any number of matters on which it might be positively beneficial for the Commission to make rules rather than proceed on a

case-by-case basis. There is the potentially quite complex question of what costs associated with employment discrimination litigation will and will not be disallowed. It is at least conceivable that a regulatee with a very poor equal employment opportunity record might be presumed to have incurred excess labor costs because of its exclusionary practices, and that these costs, being difficult to quantify and prove, will be rebuttably presumed to equal a certain percentage of actual labor costs.

The line is always to be drawn between regulation reasonably related to the Commission's central functions, and regulation of employment discrimination for its own sake. The line may well be difficult to draw on occasion, but it is the business of agencies—and of courts—to do so.

D. *The Commission's Constitutional Obligations.*

Petitioners' claim founded on the Constitution is that it not only empowers but also requires the Commission to proscribe employment discrimination by regulatees. This is because the actions of the regulated companies are assertedly "state action" and therefore subject to the Fifth Amendment's prohibition of racial discrimination. Three circumstances are relied on as establishing the necessary intertwining of government with private entity which results in the latter's conduct being considered "state action." These are (1) the otherwise comprehensive extent of federal regulation of the FPC regulatees; (2) the enjoyment by the companies of what amounts to a government-granted monopoly; and (3) their performance of a governmental function in the production and transmission of energy. The Commission meets the "state action" claim by denying that the government is "significantly involved" with the regulated companies.[48]

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[48] We note that the Supreme Court recently held in Jackson v. Metropolitan Edison Co., —— U.S. —— (Dec. 23, 1974),

In our view, however, the question that is most immediately relevant to the powers and duties of the Commission to regulate employment discrimination is not the familiar one of "state action" *vel non*, but the distinct, if seldom isolated, issue of what the consequences may be of a finding of "state action."

The most familiar, and perhaps also the most natural, consequence of the erasure of the distinction between government and private entity is that the constitutional obligations of the government—not to discriminate on racial grounds, not to infringe freedom of speech, etc.—devolve as well upon the ostensibly private entity and are enforceable against it.[49] It is possible, however, that the existence of the "state action" relationship also imposes some new obligation on the government. If the per-

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that the termination of service by a state-regulated electric utility did not constitute "state action" subject to the Fourteenth Amendment's due process clause. For the reason stated in text, however, we do not undertake the sifting of particular facts and circumstances necessary to say whether the same is true of the employment practices of the various kinds of Commission regulatees, among them some that are actually situated "upon . . . the public lands and reservations of the United States." 16 U.S.C. § 797(e) (1970). *Cf.* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[49] *See, e.g.*, Evans v. Newton, 382 U.S. 296, 302 (1966) ("public character" of recreation facility required that it be "treated as a public institution subject to the command of the Fourteenth Amendment"); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (lessee of state property must comply with proscriptions of Fourteenth Amendment); Terry v. Adams, 345 U.S. 461 (1953) (exclusion of Negroes by county political organization held unconstitutional); Smith v. Allwright, 321 U.S. 649 (1944) (exclusion of Negroes by state political party held unconstitutional); Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963) (federally funded hospital may not discriminate on racial grounds).

sistence of such a relationship between the government and one practicing racial discrimination constitutes an ongoing constitutional violation, for example, perhaps the government incurs an obligation to terminate the relationship.[50] This like other obligations of the government would be enforceable in a court of law, and, if it had not already been so enforced, would presumably be a ground for objecting in proceedings before the Commission to license renewals and the like.

But the petitioners urge on us a third possible consequence of the "state action" relationship, namely, that while that relationship lasts the government must affirmatively regulate its private partner to insure that the latter discharges the constitutional obligations devolving upon it because of the relationship. Precedent for an agency's being constitutionally required to detail the constitutional obligations of its regulatees is very limited, however. In *Business Executives Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), a division of this court, with one judge dissenting, held that the Constitution prohibited regulated broadcasters from rejecting all controversial advertising, and the FCC was commanded to develop "reasonable regulatory guidelines"

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[50] *See, e.g.*, McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) (Treasury Secretary enjoined from extending tax benefits to private clubs and fraternal orders that excluded Negroes); Green v. Connally, 330 F. Supp. 1150, 1164-65 (D.D.C. 1971), *aff'd sub nom.* Green v. Colt, 404 U.S. 997 (1971) (federal government permanently enjoined from extending tax benefits to racially segregated private schools); Green v. Kennedy, 309 F.Supp. 1127 (D.D.C. 1970) (preliminary injunction in same case); Irvis v. Scott, 318 F. Supp. 1246 (M.D. Pa. 1970) (state liquor license of fraternal order that excluded Negroes held invalid), *rev'd sub nom.* Moose Lodge No. 407 v. Irvis, 407 U.S. 163 (1972); Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967) (state enjoined from entering construction contracts with private parties practicing employment discrimination).

to carry out this constitutional command. *Id.* at 665.[51] That decision was, however, reversed by the Supreme Court *sub nom. Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). The notion of constitutionally requiring the FCC to regulate in a certain way was the specific subject of considerable criticism by the Court, *id.* at 125-27, though it no doubt was concerned with the problem that regulation of broadcasters under the authority of the First Amendment would itself raise First Amendment problems.

Moreover, a requirement of affirmance regulation would raise many problems. Which of the various constitutional commands addressed in the first instance to the government must the government reinterpret for its private collaborators, and what degree of specificity is required? If, as we have found to be true in the case before us, an agency lacks the statutory power to "regulate" in this way, does the Constitution itself piggy-back such power onto the statutory powers whose exercise gave rise to the state-action relationship? No such problem exists where the private entity is directly subject to the legislature without the intercession of an agency, but the proposition then becomes a truly anomalous one, namely, that the Constitution compels the legislature affirmatively to legislate in a certain way.

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[51] *See also* Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961) ("By its inaction, . . . the state has . . . made itself a party to the refusal of service. . . .) (dictum); Public Utilities Commission v. Pollak, 343 U.S. 561 (1952) (where challenge made to government's allowance of allegedly unconstitutional conduct of regulatees, the Court found it "appropriate to examine into what restriction . . . the First and Fifth Amendment place upon the Federal Government") (dictum).

III

In the light of what has been said above, the position taken by each side appears to be partially right and partially wrong. Insofar as petitioners maintain that the Commission is not completely without jurisdiction to consider, and indeed to write regulations concerning, employment discrimination by its regulatees, they appear to be correct. It is also clear, however, that they have proposed a rule which, at least in certain of its provisions, is well beyond the Commission's power to adopt. Section 9, for example, imposing on the Commission the duty to entertain and to act upon individual discrimination complaints, seems to us not reasonably related to the furtherance of the Commission's proper objectives. The hearing and adjudication of individual complaints would be an inordinately time-consuming process in view of the very slight impact it might have on the efficient operation of the regulated industries. On the other hand, those sections providing for the annual filing with the Commission of a form already due the EEOC (section 6), and for intervention and receipt of evidence in Commission proceedings (sections 10 and 11), might well be viewed as orderly methods of bringing to the Commission's attention information which could be relevant to its deliberations in the ways described in Part II of this opinion.

We do not attempt a section-by-section appraisal of the rules at this time. That would be inappropriate on this record, and in the absence of prior Commission consideration in rule making by reference to the statutory boundaries to its authority demarcated hereinabove.

Turning briefly to constitutional considerations, we doubt for reasons already stated that the Commission is required to enforce the constitutional obligations of its regulatees by affirmative regulations. The Commission

does not appear to have refused *all* affirmative regulation, however. In this context the confusion over this point in the record, along with our practice of not deciding constitutional questions unnecessarily, persuades us not to pursue the matter any further, except to say that, however we might resolve our difficulties with the proposition that the Commission is constitutionally required to adopt *some* anti-discrimination rule, we are very sure that it is not required to adopt *this* one. Constitutional obligations are occasionally translated by the courts into terms as detailed, specific, and far removed from the constitutional language as are the terms of this rule. *See, e.g., Miranda v. Arizona*, 384 U.S. 426 (1966); *United States v. Frazier*, 317 F. Supp. 1079 (M.D. Ala. 1970). This is done only occasionally, however, and after some experience has shown the need of such strict prophylaxis. In any case, it is not the courts but the Federal Power Commission which must particularize any constitutional obligation that may exist, and this task should certainly be left in the first instance to the Commission.[52]

If the petitioners have been extravagant in their claims, however, the Commission has been miserly in its response. The request for the adoption of the proposed rule may have been excessive, but it is not at all clear that the Commission was free to consider that this was the only request made. It was not in any event free to deny even that request for the reason (if it was its reason) that it had no authority whatsoever to promulgate any rules relating to employment discrimination.

The result for the purposes of the disposition of this review proceeding is that the important jurisdictional

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[52] Even in *Business Executives Move for Vietnam Peace, supra* note 67, this court chose to "leave the Commission and licensee broad latitude to develop 'reasonable regulations.'" 450 F.2d at 663.

questions inherent in it have not been framed in a meaningful way. The parties themselves have blunted and obscured their extreme positions to the point of retreat, although one that cannot in either case be exactly measured. Not wishing to be understood either to imply by a reversal that the petitioners' proposed rule could be adopted as is, or to endorse by an affirmance the Commission's broad disavowal of any jurisdiction over racial discrimination by its regulatees, we have concluded that the wisest course is to vacate the Commission's order and remand for further proceedings consistent with this opinion.[53]

It is so ordered.

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[53] We have concerned ourselves herein only with the Commission's jurisdiction—with its power to adopt rules relating to employment discrimination. Nothing has been said of the Commission's considerable discretion, in common with other agencies, not to promulgate rules even when it has the authority to do so. The Commission might well determine that rule making in the area of employment discrimination, though permissible, should be deferred at least temporarily in favor of the information and experience to be gained from case-by-case consideration of such matters as they arise in normal rate making and licensing proceedings. Since the Commission did not purport to exercise such discretion in this case, the question of whether it could validly do so is not before us.

Before the

FEDERAL POWER COMMISSION

Docket No. R-447

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

PROPOSED RULE

Section 1. *Definitions.* As used in this rule: (1) "Commission" means the Federal Power Commission; (2) "licensee" means any person, State or municipality licensed under the provisions of section 4 of the Federal Power Act, and any assignee or successor in interest thereof; (3) "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale; (4) "person" includes an individual or a corporation; (5) "public utility" means any person who owns or operates facilities subject to the jurisdiction of the Commission under Parts II or III of the Federal Power Act, and (6) "regulatee" means any licensee, natural gas company or public utility.

Sec. 2. *Policy.* The Commission finds and declares that: (1) Equal employment opportunity for all persons regardless of race, color, religion, sex or national origin is a national policy; (2) the furtherance of that national policy is a matter of the public interest, and (3) it shall, in each determination under the Federal Power Act or the Natural Gas Act with respect to the public interest, give material consideration to such national policy.

Sec. 3. *Unlawful Employment Practices.* No regulatee shall (1) fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; (2) limit, segregate or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities of otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin; (3) discriminate in admission to, or employment in, any program of apprenticeship, training or retraining, including on-the-job training, on account of an individual's race, color, religion, sex or national origin; (4) discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, State or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted or participated in any manner in an investigation, proceeding or hearing of such practice by any lawfully constituted authority, or (5) print or publish or cause to be printed or published any notice or advertisement relating to employment by such regulatee, indicating any preference, limitation, specification or discrimination based on race, color, religion, sex or national origin, except where a preference or specification is for the purpose of remedying past practices of discrimination.

Sec. 4. *Equal Employment Opportunity Programs. Duties of Management.* Each regulatee shall establish, maintain, carry out and file with the Commission a written equal employment opportunity program, in which the regulatee shall commit itself to each of the following courses of action: (1) Define the responsibility of each level of management to insure a positive application and

vigorous enforcement of the policy of equal employment opportunity, and establish a procedure to review and control managerial and supervisory performance; (2) inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and secure their cooperation; (3) communicate the equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis; (4) conduct a continuing campaign to exclude every form of prejudice or discrimination based on race, color, religion, sex or national origin from its personnel policies and practices and working conditions, and (5) conduct continuing reviews of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

Sec. 5. *Equal Employment Opportunity Programs. Substantive Content.* Each regulatee shall include in its equal employment opportunity program such specific practices as the following:

(1) To assure nondiscrimination in recruiting: (a) Posting notices in the regulatee's employment offices informing applicants of their equal employment rights and their right to notify the Federal Power Commission or other appropriate agency if they believe they have been the victim of discrimination; (b) Planning a notice in bold type on the employment application informing prospective employees that discrimination on account of race, color, religion, sex, or national origin is prohibited and they may notify the Federal Power Commission or other appropriate agency if they believe they have been discriminated against; (c) placing employment advertise-

ments in media which have significant circulation among minority groups and females in the recruiting area; (d) recruiting through schools and colleges with significant minority group and female enrollments; (e) maintaining systematic contacts with minority, human relations and female organizations, leaders and spokesmen to encourage referral of qualified minority and female applicants; (f) encouraging present employees to refer minority and female applicants, and (g) making known to all recruitment sources that qualified minority and female persons are being sought whenever the company hires.

(2) To assure nondiscrimination in selection and hiring: (a) Instructing those of the regulatee's staff who make hiring decisions that all applicants for all jobs are to be considered without discrimination; (b) cooperating with unions in the development of programs to assure qualified minority and female personnel equal opportunity for employment and including an effective nondiscrimination clause in new or renegotiated union agreements, and (c) avoiding the use of selection techniques or tests which have the effect of discrimination against minority groups or females.

(3) To assure nondiscrimination in placement and promotion: (a) Instructing those of the regulatee's staff who make decisions on placement and promotions that minority and female employees are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination; (b) giving all employees equal opportunity for positions which lead to higher positions, and inquiring as to the interests and skills of all lower paid employees with respect to any of the higher paid positions, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such positions, and (c) reviewing senior-

ity practices and seniority clauses in union contracts to insure that such practices or clauses are not discriminatory and do not have a discriminatory effect.

(4) To assure nondiscrimination in other areas of employment practices: (a) Examining rate of pay and fringe benefits for present employees with equivalent duties, and adjusting any inequities found, and (b) advising all qualified employees whenever there is an opportunity to perform overtime work.

Sec. 6. *Annual Employment Reports.* Each regulatee shall, contemporaneously with the filing of its EEO-1 form with the United States Equal Employment Opportunity Commission, file a copy thereof with the Commission.

Sec. 7. *Applicants to furnish equal employment information.* Each applicant for a license, renewal thereof, certificate of public convenience and necessity, rate change, permission to abandon a facility, permission to sell, lease or dispose of a facility, permission to merge facilities or any other permission or authorization in which the Commission is charged by law with protecting the public interest, shall include with its application (1) a report indicating the manner in which the specific practices undertaken pursuant to the regulatee's equal employment opportunity program have been applied and the effect of these practices upon the applications for employment, hiring and promotions of minority group members and females; (2) a report indicating whether any complaint has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the applicant, including the persons involved, the date of filing, the court or agency before which the matter is or has been, the file number (if any), and the disposition or current status of the matter, and (3) a copy of the regulatee's last current EEO-1 form.

Sec. 8. *Affirmative Action Plans satisfactory.* In the case of any regulatee which is required to file an affirmative action plan with the Office of Federal Contract Compliance of the United States Department of Labor or any other Federal agency, a copy of such plan may be filed in lieu of the program required under the provisions of sections 4 and 5 of this rule.

Sec. 9. *Complaints of discrimination.* Any person who believe himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, by himself or by a representative, file a complaint with the Commission. The provisions of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations with respect to the processing of complaints, the conduct of hearings and the issuance of decisions and orders shall apply to complaints filed under this section.

Sec. 10. *Intervention.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, in accordance with the provisions of section 1.8 of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations, participate in any proceeding involving applications for such authorizations or permissions as the Commission may give under statutory or other delegated authority administered by it.

Sec. 11. *Consideration of equal employment information in making public interest determinations and sanctions.* In each proceeding in which the Commission is charged by law with protecting the public interest, including but not limited to applications for licenses, certificates of public convenience or necessity, rate changes, permission to abandon facilities, permissions to sell, lease or dispose of facilities and permissions to merge facilities, the Commission shall give material consideration to

the information required to be provided under the provisions of sections 4, 5, 6 and 7 of this rule, and may deny, delay or condition any such license, certificate, rate change, or permission in accordance with such consideration.

Sec. 12. *Referrals and Deferrals to EEOC.* The Commission may refer any complaint involving a probable violation of any provision of Title VII of the Civil Rights Act of 1964, as amended, to the Equal Employment Opportunity Commission. If duplicate complaints are filed both with the Commission and with the Equal Opportunity Commission, the Commission shall defer jurisdiction and the Equal Employment Opportunity Commission will process the complaint.

Sec. 13. *Proceedings in forma pauperis.* The Commission shall, upon the filing of an affidavit of indigency by any complainant or intervener, provided reasonable counsel fees and copies of transcripts of hearings without charge.

Sec. 14. *Penalties.* The penalties prescribed for violations of the regulations or orders of the Commission under the provisions of section 21 of the Natural Gas Act and section 316 of the Federal Power Act shall apply to violations of this rule or of orders of the Commission issued pursuant thereto.

Sec. 15. *Court Review of Orders.* Any party aggrieved by an order of the Commission issued pursuant to this rule may apply for rehearing and court review of such order in accordance with the provisions of section 19 of the Natural Gas Act of section 313 of the Federal Power Act.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

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September Term, 1974

No. 72–1959

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Before: Bazelon, Chief Judge, McGowan and MacKinnon, Circuit Judges.

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Power Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the Commission's order on review herein is hereby vacated and the case is remanded for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

HUGH E. KLINE, *Clerk.*

Date: February 5, 1975.

Opinion for the Court filed by Circuit Judge McGowan.

APPENDIX C

United States of America Federal Power Commission

EMPLOYMENT PRACTICES

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

DOCKET NO. R–447

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

THE NATIONAL URBAN LEAGUE

THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

THE NATIONAL ORGANIZATION FOR WOMEN

THE WOMEN'S EQUITY ACTION LEAGUE

THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS (IN CALIFORNIA)

THE ASSOCIATION FOR THE BETTERMENT OF BLACK EDISON EMPLOYEES

THE OFFICE OF COMMUNICATIONS OF THE UNITED CHURCH OF CHRIST

THE CENTER FOR COMMUNITY CHANGE

THE AMERICAN G.I. FORUM (IN CALIFORNIA)

THE MEXICAN AMERICAN POLITICAL ASSOCIATION

UNITED NATIVE AMERICANS, INC.

OPINION NO. 623

DECLARATORY OPINION AND ORDER ON PETITION FOR ISSUANCE OF A RULE RELATIVE TO EMPLOYMENT PRACTICES

(Issued July 11, 1972)

The petition to which this Opinion is addressed was filed June 22, 1972, and is treated herein as a petition

for a declaratory order. See 1.7(c) Federal Power Commission Rules of Practice and Procedure, 18 CFR 1.7(c).

Petitioners raise important issues of policy and law which should be considered through judicial interpretation of regulatory statutes and laws and regulations governing employment practices and equal opportunities. This subject matter has been considered previously by the Commission as it affects statutory provisions which the Federal Power Commission administers. Those Commission determinations have not been challenged on appeal, even though one or more petitioners herein were parties.

Three docketed cases [1] have arisen under the Federal Power Act, 16 U.S.C. 791(a) *et seq.*, in which a number of the underlying legal issues raised in the subject petition were considered. They were resolved by the Commission in a manner consistent with the views set forth in this Opinion and Order. They were presented in arguments raised by certain of the petitioners now before the Commission.

The Commission lacks the legal authority to promulgate equal employment opportunity regulations covering employment practices of those systems which it regulates as natural gas companies, public utilities or licensees, because it lacks the requisite delegation of Congressional authority to act in that area. Executive authority and constitutional considerations do not provide the basis for Commission jurisdiction.

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[1] *Pacific Gas and Electric Company*, 44 FPC 1365, 1373 (1970), appeals dropped, unreported orders of the Court of Appeals for the Ninth Circuit filed April 26, 1971, and June 22, 1971, *Pacific Gas and Electric Company* v. *Federal Power Commission*, Nos. 71-1027, 71-1028, 71-1453 and 71-1454; and *Virginia Electric and Power Company*, FPC , order issued August 5, 1971, not appealed.

Simply stated, the Commission is not the designated agency for the administration of equal employment laws or any other type of labor regulation. As pointed out *infra,* regulation of this type is the province of a specific number of departments and agencies of the Federal Government, and state agencies.

Where the Commission does have specific responsibilities in the area of equal rights, they are being enforced. These are: (1) as an employer and agency of the Federal Government subject to the requirements of Executive Order No. 11478, August 8, 1969, 34 F.R. 12985; and (2) as the Congressionally delegated agency charged by the Congress with the duty to administer the comprehensive use of resources standard governing hydroelectric licensing under the Federal Power Act, 16 U.S.C. 803(a), i.e., in a manner to insure that multi-purpose hydroelectric facilities (e.g., power production, navigation, recreation and other uses), are open to use by all persons upon nondiscriminatory bases. Implementing regulations of the Commission are set forth in Federal Power Commission Administrative Order No. 131, Equal Employment Opportunity, issued January 26, 1970, *Administrative Manual;* and Federal Power Commission Order No. 341 Amending Regulations Under the Federal Power Act, Prohibition of Discrimination at Recreational Facilities at Licensed Hydroelectric Projects, issued April 19, 1967, 37 FPC 775.[2]

The Commission is mindful and fully supportive of the National policies of this Nation directed at the elimination of discriminatory treatment of persons based upon race, creed, color, religion, sex or national origin. The Commission welcomes judicial review and

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[2] Codified Part 8 Commission Regulations under the Federal Power Act, 18 CFR Part 8.

final resolution of the findings and conclusions set forth in this Opinion.

Requested Relief.—Petitioners seek a general rulemaking action of the Commission directed to the promulgation of "* * * regulations prohibiting discrimination on account of race, color, religion, sex and national origin and assuring equal opportunity in the employment practices of its regulatees * * *." Petition, p. 3. Procedurally, petitioners seek public hearings before the Commission, oral argument and a general public rulemaking through notice of a rule[3] and written responses thereto. We deny that request because of the basic conclusions which the Commission has reached relative to the scope of its regulatory authority. As the Commission stated in *Pacific Gas and Electric, supra,* 44FPC 1368:

> The legal issues, which must be of concern to us in this proceeding, are those over which we have jurisdiction. We do not find the issues raised * * * sufficiently related to a legitimate regulatory purpose as expressed in the Federal Power Act that we can proceed as requested * * * we do not find it appropriate in the exercise of our general administrative power to order a hearing on ultimate issues which we could not lawfully resolve.

The bases of the Commission's jurisdiction to act in respect to natural gas companies, public utilities and licensees, are statutory: namely, the Federal Power Act, 16 U.S.C. 791(a) *et seq.,* passed in 1920 as the Federal Water Power Act, 41 Stat. 1063, and substantially amended in 1935, 49 Stat. 838; and the Natural Gas Act, 15 U.S.C. 717 *et seq.,* passed in 1938. Other statutes cited by petitioners in support of their

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[3] A proposed rule annexed to the petition is reproduced in Appendix A hereto.

claims do not grant jurisdictional authority to this Commission. In our judgment, the Congress has not granted authority under any of these statutes for this agency to act as a remedial forum for the redress of unlawful employment practices.

Discussion of Authorities—Petitioners legal arguments are directed to various sections of the Natural Gas Act, the Federal Power Act, the Civil Rights Act of 1964, as amended, 78 Stat. 241, 42 U.S.C. 1971 *et seq.*, the Civil Rights Act of 1866, 14 Stat. 27, the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), Executive Order Nos. 11246 and 11375, the Fifth Amendment to the United States Constitution and the Fair Employment Practices Act of various states. We consider these *seriatim*.

Referring to the Natural Gas Act and natural gas companies, petitioners cite sections dealing with the Congressional grant of jurisdiction to the Commission to regulate interstate transportation and sale of natural gas for resale in interstate commerce in the public interest, 15 U.S.C. 717(a); the certification of such transactions and facilities therefor of natural gas companies and abandonment thereof as required by the public convenience and necessity, 15 U.S.C. 717f(b)(c); the control of the types of wholesale gas services of natural gas companies and rates therefor as required under a standard of just, reasonable, without undue discrimination or preference, 15 U.S.C. 717c(b), d; and general administrative procedural authority of the Commission, 15 U.S.C. 717o.

Referring to the Federal Power Act and public utilities and licensees, petitioners cite sections dealing with the Congressional grant of jurisdiction to regulate interstate transmission and sale of electric energy for resale in interstate commerce in the public interest, 16 U.S.C. 824(a); the control of the merger, sale

or disposition of jurisdictional properties of public utilities or acquisition of the capital securities thereof as required in the public interest, 16 U.S.C. 824b(a)(b); the control of the types of wholesale or bulk power services of public utiliites and rates therefor as required under a standard of just, reasonable, without undue discrimination or preference, 16 U.S.C. 824d(b), e; the licensing of hydroelectric project works of licensees upon streams over which the Congress has jurisdiction, upon public lands and reservations of the United States and at federally owned dams, 16 U.S.C. 797(e); and the general administrative procedural authority of the Commission, 16 U.S.C. 825h.

Essentially, petitioners argue that public interest considerations enfold the national policies against discrimination in employment and therefore make their implementation and execution a part of this Commission's regulatory jurisdiction and authority. We can not accept this generalized argument. Application of public interest concept in the context of any given regulatory statute presupposes inquiry into, and observance of, the legislative purposes of that Act. As pointed out *infra*, the Purposes of the National Gas and Federal Power Acts are economic regulation of entrepreneurs engaged in resource developments. So considered, we do not find the necessary nexus between those aspects of our economic regulatory activities and the employment procedures of the utility systems which we regulate, as would justify the ultimate conclusion petitioners draw. We distinguish employment procedures from other subjects such as national defense considerations, antitrust, environmental requirements, navigation, flood control or recreation, all of which are reflected in the Natural Gas and Federal Power Acts. See for example, 15 U.S.C. 717j,

717s(a); and 16 U.S.C. 803(a)(h), 804, 805, 809, 824a (a) and 825j.

Nothing in either of the basic statutes which we administer—the Federal Power Act and the Natural Gas Act—and particularly the sections referenced by petitioners, addresses the matter of employment procedures of natural gas companies, public utilities or licensees, nor does the legislative history of either Act give any basis for believing that Congress intended to confer jurisdiction upon the Commission to regulate those activities. Both statutes are economic regulatory devices born out of economic development and financial conditions which prevailed nationally earlier in this century. The Federal Water Power Act (Part I of the Federal Power Act), is, as its preamble states, "* * * An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of public lands in relation thereto * * * and for other purposes.", 41 Stat. 1063. The Federal Power Act is Title II of the Public Utility Act of 1935, 49 Stat. 838, "An Act To provide for control and regulation of public utility holding companies, and for other purposes.", 49 Stat. 803. The Natural Gas Act, as its preamble states, is "An Act To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.", 52 Stat. 821.

Constitutional considerations and the inability of individual states to regulate and control multi-state utility operations, i.e., interstate transmissions and wholesale transactions involving electric energy and natural gas were principal factors in the enactment of the Federal Power and Natural Gas Acts. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *Federal Power Commission, et al.* v. *Natural Gas Pipeline Co., et al.*, 315 U.S. 575,

581–83 (1942); *Connecticut Light & Power Co.* v. *Federal Power Commission,* 324 U.S. 515, 525–531 (1945); and *Federal Power Commission* v. *Southern California Edison Company, et al.,* 376 U.S. 205, 213–14 (1964). In short, Congress, through the enactment of these statutes, provided Federal regulation of electric and natural gas services and transactions which are beyond the reach of state public service commission control. See for example, House Report No. 61, on H.R. 3184 (which became the Federal Water Power Act), 66th Cong., 1st Sess., p. 5; Senate Report No. 621, on S. 2796 (which became the Federal Power Act), 74th Cong., 1st Sess., pp. 3, 17–18, 22; and House Report No. 709 on H.R. 6586 (which became the Natural Gas Act), 75th Cong., 1st Sess., pp. 1–3.

The consumer and services and prices for electric and gas utility services were focal points of Congressional concern in the enactment of both statutes. See *Pennsylvania Water & Power Co. et al.* v. *Federal Power Commission et al.,* 343 U.S. 414, 418 (1952) "A major purpose of the whole Act is to protect power consumers against excessive prices * * *."; *Atlantic Refining Co., et al.* v. *Public Service Company of New York, et al.,* 360 U.S. 378, 388 (1959), "the [Natural Gas] Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."; and *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp., et al.,* 365 U.S. 1, 19 (1961) "When Congress enacted the Natural Gas Act, it was motivated by a desire 'to protect consumers against exploitation at the hands of natural gas companies'."

It is in the context of these considerations that we reject petitioners' broad public interest arguments. The public interest concept does not provide the basis for this Commission to regulate employment proce-

dures of natural gas companies, public utilities or licensees, any more than the public interest would have us regulate the securities, the taxes, the patents, the safety, the wages and hours, the advertising or any other of a number of areas which Congress has created specialized agencies to regulate, including equal employment opportunities. The Natural Gas and Federal Power Acts do not admit of such interpretation.

Congress has acted in the area of labor law and equal employment opportunity protection. See, for example, 29 U.S.C. Chapters 1–15, and in particular, Chapter 2. Women's Bureau, Chapter 4B. Federal Employment Service, Chapter 5. Labor Disputes, Mediation and Injunctive Relief, Chapter 6. Jurisdiction of Courts in Matters Affecting Employer and Employee, Chapter 7. Labor-Management Relations, Chapter 8. Fair Labor Standards, Chapter 9. Portal to Portal Pay, Chapter 11. Labor-Management Reporting and Disclosure Procedure, Chapter 12. Department of Labor, Chapter 14. Age Discrimination in Employment, and Chapter 15, Occupational Safety and Health; the Civil Rights Act of 1964, 78 Stat. 241; the Equal Pay Act of 1963, 77 Stat. 56; and the Equal Employment Opportunity Act of 1972, 86 Stat. 103.[4] In no instance did the Congress specify ad-

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[4] *Cf.* the Civil Rights Acts of 1866, 14 Stat. 27, and 1870, 16 Stat. 140, 42 U.S.C. 1981–1982, Equal rights under the law, Property rights of citizens.

§ 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens, and shall be subject to like punishment, pains, penal-

ministrative duties for this Commission in these areas.

The basic statute of concern in light of petitioners' arguments, is the Civil Rights Acts of 1964, as amended, including the Equal Employment Opportunity Act of 1972. As pointed out in the Opinion of the Supreme Court, *Griggs, et al.* v. *Duke Power Company,* 401 U.S. 424, 429–31 (1971), "The objective of Congress in the enactment of Title VII [Civil Rights Act of 1964] * * * was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees * * * what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate insidiously to discriminate on the basis of racial or other impermissible classification." Title VII of that Act, 78 Stat. 253, 42 U.S.C. 2000e, establishes the Equal Employment Opportunity Commission to administer those provisions. That Act specifies the actions which constitute unlawful employment practices, 42 U.S.C. 2000e–2, –3.[5] Investigatory authority is conferred

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ties, taxes, licenses, and exactions of every kind, and to no other.

§ 1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

[5] Among the proscribed conduct are "* * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual wth respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * * or * * * to limit, segregate, or classify * * * to deprive any individual of employment opportunities or otherwise adversely affect * * * status as an employee, because of such individual's race, color, religion, sex, or national origin", 42 U.S.C. 2000e–2(a)(1)(2).

upon the EEOC, including examination of witnesses and production of evidence with provision for judicial enforcement of investigatory determinations, 42 U.S.C. 2000e–5, –8, –9. The EEOC may prescribe procedural regulations pursuant to the requirement of the Administrative Procedure Act, 42 U.S.C. 2000e–12. It may direct the keeping of records relevant to employment practices and enforcement of the Civil Rights Act, subject to the statutory provision that information so obtained by the EEOC shall not be made public by it prior to the initiation of any proceeding involving such information, 42 U.S.C. 2000e–8. Its investigation of claimed violations of Title VII, by statute, are not public without the written consent of the parties and may not be used as evidence in any subsequent proceeding, 42 U.S.C. 2000e–5(a). The Act provides for mediation and conciliation measures leading to voluntary compliance measures by the EEOC, 42 U.S.C. 2000e–5(a). Private persons aggrieved have recourse to the courts with injunctive and equitable remedies, together with court appointed counsel, 42 U.S.C. 2000e–5(e). The Act also provides for civil enforcement actions by the Attorney General, 42 U.S.C. 2000e–6, –5(e).

Pursuant to the 1972 amendments, the coverage of Title VII provisions are extended to certain state and local government authorities and private employers with 15 or more persons and private and public educational institutions, 86 Stat. 103, 42 U.S.C. 2000e.

The power of the EEOC is extended "* * * to prevent any person from engaging in any [equal opportunity] unlawful employment practices * * *", 86 Stat. 104, 42 U.S.C. 2000e–5. The EEOC is required to serve notice of charges, which, by statute, are not to be made public by the Commission; to investigate the same, according "* * * substantial weight to final

findings and orders made by state or local authorities in proceedings commenced under State or local law * * *"; and to endeavor to mediate or conciliate controversies which have reasonable cause, or otherwise to dismiss the charge. The EEOC is to defer, initially, to state or local agencies having jurisdiction in the premises under an exhaustion of remedies principle. Where the EEOC is unable to mediate or conciliate, it may bring a civil action in the Federal courts in pursuit of equitable remedies or affirmative relief. Where the respondent party is a governmental authority, the Act provides for initiation of such court actions by the Attorney General. The EEOC and the Attorney General are also authorized to seek temporary judicial relief. The party aggrieved may also initiate court action under certain conditions, may seek court appointed counsel and may intervene in actions initiated by the EEOC or the Attorney General. The Equal Employment Opportunity Act of 1972 provides for transfer of these functions of the Attorney General to the EEOC effective in 1974.

The 1972 amendments confer upon the EEOC, in connection with its hearings and investigations, the powers of National Labor Relations Act, 29 U.S.C. 161, 86 Stat. 109, 42 U.S.C. 2000e–9. The type of investigatory rulemaking which petitioners seek before this Commission is within the authority of the EEOC to effectuate. Indeed, that agency's established reporting requirements appear to comprehend essentially the type of information which petitioners seek to assemble through this agency. The amendments provide for a Presidentially appointed general counsel of the EEOC with the "* * * responsibility for the conduct of litigation as provided in Sections 706 and 707 [42 U.S.C. 2000e–5, –6] of this title.", 86 Stat. 110, 42 U.S.C. 2000e–4. In the enactment of the 1972 revisions to the

Civil Rights Act of 1964, the Congress considered and rejected a provision whereby recognized remedies for enforcement of equal rights and labor practices would be pre-empted. See, United States Code Congressional and Administrative News, 92nd Cong., 2nd Sess., No. 3, pp. 1049–50, 1022, 1043–44. Congress clearly evidenced its intention regarding the enforcement of equal rights, including its intention in respect to administrative actions dealing with equal employment opportunities. The Civil Rights Act, as amended, does not specify that all departments and agencies are to undertake the administration or implementation thereof. When the Congress wishes to accomplish that result, it so states. See, National Environmental Policy Act of 1969, 42 U.S.C. 4321, 4332, 4333.

The 1972 amendments establish an Equal Employment Opportunity Coordinating Council with "* * * responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. * * *", 86 Stat. 111. The Council is comprised of the Attorney General, Secretary of Labor, and the Chairmen of the EEOC, the United States Civil Service Commission and the United States Civil Rights Commission.

The Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), cited by petitioners, is a part of the Fair Labor Standards Act of 1938, enforced by the Wage and Hour and Public Contracts Divisions of the Labor Department, not the Federal Power Commission. That Act's provisions are directed to wage differentials

based upon sex. As such, the coverage of this Act is more restrictive than the Civil Rights Act's prohibition of discrimination based upon sex, the latter extending to areas other than wage discrimination. Criminal and civil actions may ensue in enforcement of the Fair Labor Standards Act.

Executive Order No. 11246, September 24, 1965, 30 F.R. 12319, as amended by Executive Order No. 11375, October 13, 1967, 32 F.R. 14303, implements the "* * * program of equal employment opportunity in Government employment, employment by Federal contractors and sub-contractors and employment under federally assisted construction contracts * * *", regardless of sex, race, creed, color, or national origin, 3 CFR 685. As recognized in these orders, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, enunciates the national policy of equal opportunity in private employment, and Title VI, 78 Stat. 252, is specifically directed to non-discrimination in federally financially assisted programs. The Secretary of Labor is the designated administering official of Parts II and III of Executive Order No. 11246, which relate to Government contractors, sub-contractors, and federally assisted programs. Executive Order No. 11247, September 24, 1965, 30 F.R. 12327, assigns coordinating function responsibilities to the Attorney General in respect to Title VI matters. The Secretary of Labor, by Order No. 15–68, August 8, 1968, 33 F.R. 12600, assigned the responsibility under Executive Order No. 11246, to the Office of Federal Contract Compliance.[6]

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[6] Order No. 15–68 states in part (33 F.R. 12600–1):

"Under the general direction of the Secretary * * * the Office of Federal Contract Compliance (EEO) is hereby delegated authority and assigned responsibility for: * * * Carry-

(Continued)

Order No. 1, issued October 24, 1969, by the Office of Federal Contract Compliance re-delegates certain of its responsibilities to 16 departments or agencies, each with designated compliance responsibility relative to equal employment opportunity.[7] Order No. 1 states in part:

> "2. Action.—a. The agencies listed herein below are designated as compliance agencies. Other agencies, not so listed, are hereby relieved of any compliance responsibilities under the Executive Order [11246].", Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 4380. The Office of Federal Contract Compliance and the Equal Employment Opportunity Commission, on May 20, 1970, 35 F.R. 8461, entered into a Memorandum of Understanding "* * * to reduce duplication of compliance activities and to facilitate information exchange * * *."

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ing out * * * Parts II, III, IV of Executive Order No. 11246 as amended by Executive Order No. 11375 * * * Developing and recommending to the Secretary rules and regulations necessary or appropriate to achieve the purposes of * * * 11246 * * * 11375 * * * Coordinating with the Equal Employment Opportunity Commission and the Department of Justice on matters relating to Title VII * * * and maintaining liaison with other agencies having civil rights and equal employment opportunity activities * * *."

[7] The departments and agencies are: Agency For International Development, Department of Agriculture, United States Atomic Energy Commission, Department of Commerce, Department of Defense, General Services Administration (whose industries include electric, gas and sanitary services, holding and investment companies), Department of Health, Education and Welfare, Department of Housing and Urban Development, Department of the Interior (whose industries include mining and oil, petroleum, refining and related industries and pipeline transportation), National Aeronautical and Space Administration, Post Office Department, Department of Transportation, Tennessee Valley Authority, Department of the Treasury, Veterans Administration and the Environmental Protection Agency.

The Office of Federal Contract Compliance Implementing Rules and Regulations under Executive Order 11246, are set forth in Title 41, Code of Federal Regulations, Chapter 60, Part 60–1, Obligations of contractors and sub-contractors, Part 60–2, Affirmative action programs, Part 60–3, Employee testing and other selection procedures, Part 60–5, Washington plan, Part 60–6, San Francisco plan, Part 60–7, St. Louis plan, Part 60–8, Atlanta plan, and Part 60–20, Sex discrimination guidelines.[8] The Implementing Rules and Regulations of the Equal Employment Opportunity Commission are set forth in Title 29, Code of Federal Regulations, Chapter XIV, Part 1600 Employee responsibilities and conduct, Part 1601, Procedural regulations, Part 1602, Records and Reports, Part 1604, Guidelines on Discrimination because of sex, Part 1605, Guidelines on Discrimination because of religion, Part 1606, Guidelines on Discrimination because of national origin, Part 1607, Guidelines on Employee selection procedures, and Part 1610, Availability of Records.[9]

The foregoing matters we believe, effectively demonstrate why this Commission does not have the responsibilities pursuant to Executive Order Nos. 11246 and 11375, as alleged by petitioners.

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[8] Office of Federal Contract Compliance Order No. 14, issued January 14, 1972, sets forth proposed new procedures to standardize compliance reviews of employment in Federal contract areas. Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 4345.

[9] See also, Regulations of the Department of the Interior and of the General Services Administration, pursuant to their assigned responsibilities under Title VI of the Civil Rights Act of 1964 (Interior), 43 CFR Parts 17 and 17a, and (GSA), 41 CFR Subpart 101–6.2. Accommodations between Federal Labor and Civil Rights Laws are discussed in Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 5063.

Petitioners also cite the Fifth Amendment to the Constitution in support of their claims. We find nothing in the Constitution or the judicial interpretations thereof, as would support Commission regulation of utility employment practices. That which the Constitution does require, this Commission is now doing. No governmental action which this agency takes denies any person of equal protection of the laws. See *Moose Lodge No. 107* v. *Irvis, et al.*, —— U.S. ——, decided June 12, 1972, Slip Op. pp. 8–9, which discusses constitutional protections in the context of the Fourteenth Amendment:

> In 1883, this Court in *The Civil Rights Cases,* 109 U.S. 3, set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, "however discriminatory or wrongful," against which that clause "erects no shield," *Shelley* v. *Kraemer,* 334 U.S. 1, 13 (1948). That dichotomy has been subsequently reaffirmed in *Shelley* v. *Kraemer, supra,* and in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1951).
>
> While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "State action," on the other hand, frequently admits of no easy answer. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority, supra,* at 772.
>
> Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination. *Shelley* v. *Kraemer, supra.*

This Commission, as pointed out in *Pacific Gas and Electric, supra,* 44 FPC 1367–8, does not countenance discriminatory treatment in respect to the rendition of utility services which it regulates, based upon race, sex, color, creed or national origin; does not permit its hydroelectric licensees owning or operating multiple purpose reservoirs to discriminate in the use thereof, based upon race, sex, color, creed or national origin; and has affirmatively spoken out in respect to the need for all utility suppliers to fully implement the Nation's policy respecting elimination of discrimination in employment. Thus, where this agency takes "State action" within the meaning of Constitutional considerations, its processes do not deny equal protection of the laws either by reason of any Commission rule, regulation or order or by reason of enforcement of a private discriminatory action.

Petitioners' references to actions of the Federal Communications Commission and the Public Service Commission of the District of Columbia, are not persuasive in the interpretation of the provisions of Federal Power and Natural Gas Acts. Both are legally distinguishable. The Federal Communications Commission, the one Federal administrative utility regulatory body which has promulgated regulations in the area of equal employment practices of its regulatees of the general type petitioners seek, did so following judicial interpretation of one of the basic statutes which it administers, the Communications Act of 1934, 47 U.S.C. 151 *et seq., Office of Communication of the United Church of Christ, et al.* v. *F.C.C., et al.,* 359 F. 2d 994, 1003, 1006 (CADC, 1966).[10] The Court recog-

[10] As petitioners note, the Interstate Commerce Commission initiated a rulemaking inquiry on May 6, 1971, to consider whether there is discrimination in carriers' employment practices, whether laws are being violated, whether that Commis-

(Continued)

nized two basic concepts of that Act with a nexus to employment practices, the "fairness doctrine" and the "public reaction to programming test",[11] neither

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sion has jurisdiction to deal with the matter, and what action the Commission should take if it has jurisdiction, Notice of Proposed Rulemaking, Ex-Parte No. 278, 36 F.R. 10741. The Securities and Exchange Commission, by Release Nos. 5170 and 9252, July 19, 1971, called attention to disclosure requirements in SEC forms as to civil rights legal actions affecting the security registrant's business activities, such as loss of government contracts or civil rights enforcement activities. The Federal Home Loan Bank Board Regulation referred to by petitioners, April 21, 1972, 37 F.R. 8436, is an exercise of responsibility which that agency has by reason of *inter alia*, Title VIII, Fair Housing, Public Law 90–284, 82 Stat. 73, 81.

[11] Both tie to program content of mass communication media and relate to the bases upon which the FCC assesses the public performance of media facility owners under its licensing procedures, that in contradistinction to direct governmental control of programming. See Memorandum Opinion and Order and Notice of Proposed Rulemaking of the Federal Communications Commission released July 5, 1968, the initial order of that Commission in a series of actions, 33 F.R. 9960, 9961–2, which states in part:

"9. * * * there is the consideration that broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license. When these two considerations are taken together—the national policy against discrimination and the nature of broadcasting—we simply do not see how the Commission could make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the national policy. In this respect—a mass media service to the public which is based entirely on a Federal license under a public interest standard—the situation clearly parallels the Federal policy in contract awards.

* * * * *

"11. The same question is raised when a substantial charge is made that a licensee is deliberately discriminatory in his em-

of which are reflected in the Natural Gas or Federal Power Acts. The Communications Commission, by orders released March 29, 1972, 37 F.R. 6586, February 12, 1971, 36 F.R. 3119, August 11, 1970, 35 F.R. 12892, and June 3, 1970, 35 F.R. 8825, adopted reporting regulations requiring cable television operators, comunications common carriers and broadcast licensees or permittees to affirmatively show non-discrimination plans in employment practices and to complete annual reporting thereon. Through Notice of Proposed Rulemaking released June 28, 1971, that Commission initiated inquiry into proposed regulations relative to discrimination based upon sex as a part of that Commission's administrative law, 36 F.R. 12542. A rule was adopted and released on December 21, 1971, 36 F.R. 25012.

The action of the District of Columbia Public Service Commission in respect to equal opportunity employment practices of its regulatees, *Re Potomac Electric Power Company,* 83 PUR 3d 113, 147–8, 152–8 (1970), 84 PUR 3d 236, 246 (1970), rests upon specific authority in that Commission. This includes statutory provisions governing that agency, 43 DC Code 303, general federal law, Civil Rights Act of 1964, Executive Order No. 11246 and general police regulation, District of Columbia Commissioners Order

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ployment policies. A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public. Thus, it immediately raises the question of whether he is consulting in good faith with Negro community leaders concerning programming to serve the area's needs and interests. Indeed, the very fact of discriminatory hiring policies may effectively cut the licensee off from success in such efforts."

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No. 65–768.[12] That Commission is currently considering this subject in relation to the Potomac Electric Power Company. See, PSC–DC, Formal Case No. 576, In the Matter of Investigation of Employment Practices of the Potomac Electric Power Company.

Recent cases before the California Public Utilities Commission have established that the PUC does not have jurisdiction over such employment practices of regulated entities, *NAACP et al.* v. *All Regulated Public Utilities et al.*, Cal. P.U.C. Decision No. 77781, dated October 6, 1970, petition for writ of review denied the state Supreme Court unreported order, April 29, 1971; and *Re Pacific Gas & Electric Company,* 87 PUR 3d 270, 312 (1971). In substance, the California Commission found minority hiring practices to be a matter not within the scope of the state utility laws, but, rather, under the State Fair Employment Practice Act.

Petitioners refer to various state fair employment practice laws. We do not find regulatory jurisdiction in this Commission based upon those provisions. Moreover, as noted, *supra,* even the Equal Employment Opportunity Commission must defer to state agencies having jurisdiction in this area under an exhaustion of remedies principle.

We wish to make clear that should the Congress assign to this agency responsibility of the type proposed by petitioners, we would undertake the enforce-

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[12] 43 DC Code 303 states: "The Commission shall have power * * * to require and compel every public utility to comply with * * * all other laws of the United States applicable, and any municipal ordinance or regulation relating to said public utility." DC Commissioners Order No. 65–768 (D.C. Police Regulations, Article 47, Section 4), is a general police regulation prohibiting employment discrimination based upon race, color, religion, national origin or sex.

ment thereof as a matter of highest priority. We indicated in *Pacific Gas and Electric Company, supra,* 44 FPC 1368, our full commitment to " * * * the national policy that discrimination in employment is to be eliminated by all elements of our society, public and private. * * * ".

Limitations of the Proposed Rule—As will be apparent from an examination of the rule as proposed by petitioners, the processing of any complaints thereunder before an agency such as this Commission, which must observe the requirements of the Administrative Procedure Act and general public disclosure procedures, 5 U.S.C. 551 *et seq.,* would inevitably do violence to the non-public disclosure principles of the Civil Rights Act, 86 Stat. 104, 42 U.S.C. 2000e–5(a), 78 Stat. 264, 42 U.S.C. 2000e–8(e). Complaints of discrimination under Section 9 of the proposed rule, or Section 10 intervenor actions, would be public information under this agency's procedures, 18 CFR 1.36(c). Charges of discrimination are not public under the Civil Rights Act, 86 Stat. 104. Similarly, a general public disclosure of annual employment reporting data (EEO–1), pursuant to Section 6 of the proposed rule, would appear to transcend the non-disclosure principle of the Civil Rights Act, 78 Stat. 264.

Additionally, the proposed rule transcends basic legal requirements of the Federal Power and Natural Gas Acts. The statutory bases upon which this Commission must judge particular applications are set forth in the two Acts. Section 11 of the proposed rule would have that judgment accomplished basically in accordance with standards of the Civil Rights Act and general public interest concepts. Also, the penalty and enforcement provisions of the Natural Gas and Federal Power Acts, 15 U.S.C. 717s, 717t, 16 U.S.C. 825m,

825n, 825o, relate to proscribed conduct under those Acts. Section 14 of the proposed rule is directed to other laws. Section 15 of the proposed rule presents a similar legal difficulty in respect to appellate review procedures. Natural Gas and Federal Power Acts, 15 U.S.C. 717r, 16 U.S.C. 825*l*. Section 13 of the proposed rule assumes authority in this Commission to provide counsel fees. This agency does not have such authority. See, *Power Authority of the State of New York,* Order Denying Motions and Appeals, —— FPC ——, issued October 29, 1971 (mimeo. ed., pp. 3–4).

Administratively, the rule, as proposed, would be duplicative of established procedures which now operate throughout the Nation in respect to equal employment opportunity. These procedures are as outlined, *supra.* The Department of Justice has instituted a number of enforcement actions under those procedures. See, for example, *United States* v. *Louisville Gas and Electric Company,* United States District Court for the Western District of Kentucky, Civil Action No. 7312–G, order June 30, 1972; *United States* v. *Piedmont Natural Gas Company,* United States District Court for the Western District of North Carolina, Civil Action No. 72–128, order June 15, 1972; *United States* v. *Virginia Electric and Power Company, et al.,* 327 F.Supp. 1034 (1971), 4 EPD Paragraph 7502 (1971); and, *United States* v. *Georgia Power Company,* 3 EPD Paragraphs 8143, 8318 (appeal pending USCA5, No. 71–344).

To adopt the proposed rule would (a) make the criminal penalties of the Natural Gas Act, 15 U.S.C. 717t, and the Federal Power Act, 16 U.S.C. 825o, apply to violations of whatever employment codes were adopted by the Commission, and there is no indication of Congressional intent for this result; (b) make the determination of a violation subject to ad-

ministrative hearings rather than through trial in court, and the 1972 Act makes clear that the Congress intended a judicial, not an administrative, forum, pp. 10–11, *supra;* (c) make the determination of a just and reasonable rate turn on employment practices rather than upon adequate and reliable service to consumers at the lowest reasonable rate. In our view, Congress has not indicated that consumers should pay higher rates to companies which have FPC approved employment plans and lower rates to companies which do not; (d) make the determination of whether new facilities to supply needed energy to all citizens can be licensed turn upon the question of whether the company proposing the facilities has an FPC approved employment plan. Conversely, facilities already supplying needed energy would presumably be shut down as a sanction for violation of an FPC approved employment plan. There is no indication that Congress intended such a result; and (e) make a further proliferation of agencies having concurrent jurisdiction at a time when Congress had made clear its intent to coordinate such activities. This agency could not "coordinate" with other agencies on cases which are controlled by the Administrative Procedure Act.

Thus, we conclude that the primary jurisdiction over labor and employment practices lies in other agencies, as petitioners recognize when their proposed rule calls for the FPC to defer to EEOC; we conclude that that jurisdiction is exclusive in those agencies. We further conclude that neither the Natural Gas Act and Federal Power Act delegate authority to FPC to regulate employment practices, and that we hold that since there is no jurisdiction to adopt such a rule, no purpose will be served by noticing such a rule for consideration for adoption in

advance of a declaratory judgment determining the jurisdiction of the Commission.

The Commission further finds:

It is necessary and appropriate for the purposes of the Natural Gas Act and the Federal Power Act, 15 U.S.C. 717o, 16 U.S.C. 825h to order as hereinafter provided.

The Commission orders:

The petition, as described above, is hereby dismissed for lack of jurisdiction.

By the Commission.

[SEAL] KENNETH F. PLUMB,
Secretary.

[Appendix A]

(Rule As Annexed to Petition Filed With the Federal Power Commission June 22, 1972)

Before the Federal Power Commission

DOCKET NO. ——

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

PROPOSED RULE

SECTION 1. *Definitions.* As used in this rule: (1) "Commission" means the Federal Power Commission; (2) "licensee" means any person, State or municipality licensed under the provisions of section 4 of the Federal Power Act, and any assignee or successor in interest thereof; (3) "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale of interstate commerce of such gas for resale; (4) "person" includes an individual or a corporation; (5) "public utility" means any person who owns or operates facilities subject to the jurisdiction of the Commission under Parts II or III of the Federal Power Act, and (6) "regulatee" means any licensee, natural gas company or public utility.

SEC. 2. *Policy.* The Commission finds and declares that: (1) Equal employment opportunity for all persons regardless of race, color, religion, sex or national origin is a national policy; (2) the furtherance of that national policy is a matter of the public interest, and

(3) it shall, in each determination under the Federal Power Act or the Natural Gas Act with respect to the public interest, give material consideration to such national policy.

SEC. 3. *Unlawful Employment Practices.* No regulatee shall (1) fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; (2) limit, segregate or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin; (3) discriminate in admission to, or employment in, any program of apprenticeship, training or retraining, including on-the-job training, on account of an individual's race, color, religion, sex or national origin; (4) discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, State or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted or participated in any manner in an investigation, proceeding or hearing of such practice by any lawfully constituted authority, or (5) print or publish or cause to be printed or published any notice or advertisement relating to employment by such regulatee, indicating any preference, limitation, specification or discrimination based on race, color, religion, sex or national origin, except where a preference or specification is for the purpose of remedying past practices of discrimination.

SEC. 4. *Equal Employment Opportunity Programs. Duties of Management.* Each regulatee shall establish, maintain, carry out and file with the Commission a written equal employment opportunity program, in which the regulatee shall commit itself to each of the following courses of action: (1) Define the responsibility of each level of management to insure a positive application and vigorous enforcement of the policy of equal employment opportunity, and establish a procedure to review and control managerial and supervisory performance; (2) inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and secure their cooperation; (3) communicate the equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis; (4) conduct a continuing campaign to exclude every form of prejudice or discrimination based on race, color, religion, sex or national origin from its personnel policies and practices and working conditions, and (5) conduct continuing reviews of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

SEC. 5. *Equal Employment Opportunity Programs. Substantive Content.* Each regulatee shall include in its equal employment opportunity program such specific practices as the following:

(1) To assure nondiscrimination in recruiting: (a) Posting notices in the regulatee's employment offices

informing applicants of their equal employment rights and their right to notify the Federal Power Commission or other appropriate agency if they believe they have been the victim of discrimination; (b) Planning a notice in bold type on the employment application informing prospective employees that discrimination on account of race, color, religion, sex, or national origin is prohibited and they may notify the Federal Power Commission or other appropriate agency if they believe they have been discriminated against; (c) placing employment advertisements in media which have significant circulation among minority groups and females in the recruiting area; (d) recruiting through schools and colleges with significant minority group and female enrollments; (e) maintaining systematic contacts with minority, human relations and female organizations, leaders and spokesmen to encourage referral of qualified minority and female applicants; (f) encouraging present employees to refer minority and female applicants, and (g) making known to all recruitment sources that qualified minority and female persons are being sought whenever the company hires.

(2) To assure nondiscrimination in selection and hiring: (a) Instructing those of the regulatee's staff who make hiring decisions that all applicants for all jobs are to be considered without discrimination; (b) cooperating with unions in the development of programs to assure qualified minority and female personnel equal opportunity for employment and including an effective nondiscrimination clause in new or renegotiated union agreements, and (c) avoiding the use of selection techniques or tests which have the effect of discrimination against minority groups or females.

(3) To assure nondiscrimination in placement and promotion: (a) Instructing those of the regulatee's staff who make decisions on placement and promotions that minority and female employees are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination; (b) giving all employees equal opportunity for positions which lead to higher positions, and inquiring as to the interests and skills of all lower paid employees with respect to any of the higher paid positions, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such positions, and (c) reviewing seniority practices and seniority clauses in union contracts to insure that such practices or clauses are not discriminatory and do not have a discriminatory effect.

(4) To assure nondiscrimination in other areas of employment practices: (a) Examining rates of pay and fringe benefits for present employees with equivalent duties, and adjusting any inequities found, and (b) advising all qualified employees whenever there is an opportunity to perform overtime work.

SEC. 6. *Annual Employment Reports.* Each regulatee shall, contemporaneously with the filing of its EEO–1 form with the United States Equal Employment Opportunity Commission, file a copy thereof with the Commission.

SEC. 7. *Applicants to furnish equal employment information.* Each applicant for a license, renewal thereof, certificate of public convenience and necessity, rate change, permission to abandon a facility, permission to sell, lease or dispose of a facility, permission to merge facilities or any other permission or author-

ization in which the Commission is charged by law with protecting the public interest, shall include with its application (1) a report indicating the manner in which the specific practices undertaken pursuant to the regulatee's equal employment opportunity program have been applied and the effect of these practices upon the applications for employment, hiring and promotions of minority group members and females; (2) a report indicating whether any complaint has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the applicant, including the persons involved, the date of filing, the court or agency before which the matter is or has been, the file number (if any), and the disposition or current status of the matter, and (3) a copy of the regulatee's last current EEO–1 form.

SEC. 8. *Affirmative Action Plans satisfactory.* In the case of any regulatee which is required to file an affirmative action plan with the Office of Federal Contract Compliance of the United States Department of Labor or any other Federal agency, a copy of such plan may be filed in lieu of the program required under the provisions of sections 4 and 5 of this rule.

SEC. 9. *Complaints of discrimination.* Any person who believe himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, by himself or by a representative, file a complaint with the Commission. The provisions of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations with respect to the processing of complaints, the conduct of hearings and the issuance of decisions and orders shall apply to complaints filed under this section.

SEC. 10. *Intervention.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, in accordance with the provisions of section 1.8 of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations, participate in any proceeding involving applications for such authorizations or permissions as the Commission may give under statutory or other delegated authority administered by it.

SEC. 11. *Consideration of equal employment information in making public interest determinations and sanctions.* In each proceeding in which the Commission is charged by law with protecting the public interest, including but not limited to applications for licenses, certificates of public convenience or necessity, rate changes, permissions to abandon facilities, permissions to sell, lease or dispose of facilities and permissions to merge facilities, the Commission shall give material consideration to the information required to be provided under the provisions of sections 4, 5, 6 and 7 of this rule, and may deny, delay or condition any such license, certificate, rate change, or permission in accordance with such consideration.

SEC. 12. *Referrals and Deferrals to EEOC.* The Commission may refer any complaint involving a probable violation of any provision of Title VII of the Civil Rights Act of 1964, as amended, to the Equal Employment Opportunity Commission. If duplicate complaints are filed both with the Commission and with the Equal Opportunity Commission, the Commission shall defer jurisdiction and the Equal Employment Opportunity Commission will process the complaint.

SEC. 13. *Proceedings in forma pauperis.* The Commission shall, upon the filing of an affidavit of indigency by any complainant or intervener, provide

reasonable counsel fees and copies of transcripts of hearings without charge.

SEC. 14. *Penalties.* The penalties prescribed for violations of the regulations or orders of the Commission under the provisions of section 21 of the Natural Gas Act and section 316 of the Federal Power Act shall apply to violations of this rule or of orders of the Commission issued pursuant thereto.

SEC. 15. *Court Review of Orders.* Any party aggrieved by an order of the Commission issued pursuant to this rule may apply for rehearing and court review of such order in accordance with the provisions of section 19 of the Natural Gas Act of section 313 of the Federal Power Act.

APPENDIX D

United States of America Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Pinkney Walker.

DOCKET NO. R–447

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

THE NATIONAL URBAN LEAGUE

THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND

THE NATIONAL ORGANIZATION FOR WOMEN

THE WOMEN'S EQUITY ACTION LEAGUE

THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS (IN CALIFORNIA)

THE ASSOCIATION FOR THE BETTERMENT OF BLACK EDISON EMPLOYEES

THE OFFICE OF COMMUNICATIONS OF THE UNITED CHURCH OF CHRIST

THE CENTER FOR COMMUNITY CHANGE

THE AMERICAN G.I. FORUM (IN CALIFORNIA)

THE MEXICAN AMERICAN POLITICAL ASSOCIATION

UNITED NATIVE AMERICANS, INC.

ORDER DENYING PETITION FOR REHEARING

(Issued August 21, 1972)

Petitioners in the above-entitled matter on August 8, 1972, filed a petition for rehearing of Commission Opinion No. 623, Declaratory Opinion and Order on Petition for Issuance of a Rule Relative to Em-

ployment Practices, issued July 11, 1972. Petitioners annex to their petition a letter of Chairman William H. Brown, III, Equal Employment Opportunity Commission, dated July 13, 1972, addressed to the Chairman of the Federal Power Commission.

The assignments of error and grounds for rehearing set forth in the petition, including Chairman Brown's letter, set forth no new facts or principles of law which were not fully considered by the Commission when it issued its Opinion No. 623, or which, having now been considered, warrant any modification of that Opinion. Opinion No. 623 dismissed for lack of jurisdiction a petition filed June 22, 1972.

The Commission further finds:

It is necessary and appropriate for the purposes of the Natural Gas Act and the Federal Power Act, 15 U.S.C. 717o, 16 U.S.C. 825h, 1, to order as hereinafter provided.

The Commission orders:

The petition for rehearing of Commission Opinion No. 623, issued July 11, 1972, is hereby denied.

By the Commission.

[SEAL]

MARY B. KIDD,
Acting Secretary.

U.S. GOVERNMENT PRINTING OFFICE : 1975—O-576-676

JOINT APPENDIX OF THE PARTIES

Supreme Court, U. S.
FILED
DEC 1 1975
R., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-1619 and 74-1608

FEDERAL POWER COMMISSION,

Petitioner

—*v.*—

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Petitioners

—*v.*—

FEDERAL POWER COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONS FOR WRITS OF CERTIORARI FILED JUNE 20, 1975
CERTIORARI GRANTED OCTOBER 14, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-1619 and 74-1608

FEDERAL POWER COMMISSION,

Petitioner

—*v.*—

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Petitioners

—*v.*—

FEDERAL POWER COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONTENTS

	Page
Relevant Docket Entries	1
Opinion Below	*
Judgment Below	*

---

* Opinion and Judgment Below were printed as Appendices A and B of the Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in No. 74-1619 and as Appendices D and E of the cross-petition for a Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit in No. 74-1608.

CONTENTS

Page

The National Association for the Advancement of Colored People, *et al.* Petition to the Federal Power Commission for the Issuance of a Rule Requiring Equal Employment Opportunity and Nondiscrimination in the Employment Practices of its Regulatees, filed 6/22/75 3

Federal Power Commission, Opinion No. 623, Declaratory Opinion and Order on Petition for Issuance of a Rule Relative to Employment Practices, Docket No. R-447, issued 7/11/72 54

The National Association for the Advancement of Colored People, *et al.* Petition to the Federal Power Commission for Rehearing, filed 8/8/72 83

Federal Power Commission Order Denying Petition for Rehearing, issued 8/21/72 90

Order Allowing Certiorari, dated October 14, 1975, *NAACP, et al.*, v. *F.P.C.*, No. 74-1608, and consolidating with No. 74-1619 93

Order Allowing Certiorari, dated October 14, 1975, *F.P.C.* v. *NAACP, et al.*, No. 74-1619, and consolidating with No. 74-1608 94

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DATE	FILINGS—PROCEEDINGS
10-12-72	4-Petition for review of an order of the Federal Power Commission (m-12)
11-15-72	Order per CJ Bazelon that the briefing schedule is set as follows in this case: Petitioners' brief shall be filed by January 15, 1973; respondent's brief shall be filed by March 1, 1973; Petitioners' reply brief, if any, shall be filed by March 15, 1973; the appendix of the parties shall be filed by March 29, 1973
11-20-72	Certified Index to Record (n-3)
1-16-73	Order per CJ Bazelon that the motion of petitioner's to extend time is granted and the briefing schedule in this matter is revised as follows; petitioner's brief shall be filed by January 29, 1973; respondent's brief shall be filed by March 15, 1973; petitioner's reply brief, if any, shall be filed by March 29, 1973 and the joint appendix of the parties shall be filed by April 12, 1973
1-29-73	25-petitioners' brief
1-29-73	25-Brief of Amicus Curiae Equal Employment Opportunity Commission (m-29)
3-16-73	25-Respondent's brief (m-15)
4-12-73	7-Joint appendix
(B) 4-27-73	Per Curiam order denying petitioner' motion for expedited hearing; Tamm and Robb; CJ
(G) 10-15-73	4-Alternative motions of the U.S. Equal Employment Opportunity Commission to present oral argument in this case (m-12)

DATE	FILINGS—PROCEEDINGS

(B) 10-23-73 Clerk's order denying in part motion of United States Equal Employment Opportunity Commission to present oral argument or to share time with petitioners at oral argument, further ordered by the Court that that portion of the aforesaid motion requesting leave to share time with petitioners is granted to the extent agreed to by petitioners

(M) 10-29-73 Argued before CJ Bazelon; McGowan and MacKinnon, JJ; On motion by William L. Taylor Howard A. Glickstein a member of the bar of the Court of Appeals for New York was allowed to argue pro hac vice for petitioners

2-5-75 Opinion for the Court filed by Circuit Judge McGowan.

2-5-75 Judgment vacating Commissions order and remand case. (n)

(G) 5-6-75 Letter from Clerk, Supreme Court extending time to file petition for writ of certiorari to June 20, 1975 in S.C. #A-922

(K) 6-24-75 Notice from Supreme Court of filing a petition for certiorari in SC #74-1608 on June 20, 1975

(K) 6-24-75 Notice from Supreme Court of filing petition for certiorari in S.C. #74-1619 on June 20, 1975

(K) 10-21-75 Certified copy of Supreme Court order granting petition for writ of certiorari in S.C. #74-1619 and the case is consolidated with #74-1608; a total of one hour is allotted for oral argument

(K) 10-21-75 Certified copy of Supreme Court order granting petition for writ of certiorari in S.C. #74-1608 and the case is consolidated with #74-1619; a total of one hour is allotted for oral argument

Before the

FEDERAL POWER COMMISSION

Docket No. R-447

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRICT AND GAS UTILITY INDUSTRY

PETITION

of

The National Association for the Advancement of Colored People

The National Urban League

The Mexican American Legal Defense and Educational Fund

The National Organization for Women

The Women's Equity Action League

The League of United Latin American Citizens (in California)

The Association for the Betterment of Black Edison Employees

The Office of Communications of the United Church of Christ

The Center for Community Change

The American G.I. Forum (in California)

The Mexican American Political Association

United Native Americans, Inc.

Come now the above named petitioners and, pursuant to subsection (b) of section 1.7 of title 18 of the Code of Federal Regulations and subsection (e) of section 553 of title 5 of the United States Code, petition the FEDERAL POWER COMMISSION for the issuance of a rule requiring equal employment opportunity and nondiscrimination in the employment practices of its regulatees.

1. WHEREAS, The Federal Power Commission has jurisdiction over this matter pursuant to Section 309 of the Federal Power Act, 16 U.S.C. 825h, and Section 16 of the Natural Gas Act, 15 U.S.C. 717o;

2. WHEREAS, the above named petitioners are all organizations representing the interests of black, Spanish surnamed, native and female Americans and are dedicated to the achievement of equal opportunity and the advancement of civil rights (The interest of the above named petitioners is more fully set forth in the attached statement);

3. WHEREAS, natural gas companies are subject to regulation by the Federal Power Commission pursuant to the Natural Gas Act, 15 U.S.C. 717 et seq., and hydroelectric projects and electric public utilities are subject to regulation by the Federal Power Commission pursuant to the Federal Power Act, 16 U.S.C. 719) et seq.;

4. WHEREAS, employment discrimination on a nationwide basis exists in the electric and gas utility industry, comprising natural gas companies, hydroelectric projects and electric public utilities (Statistical evidence of the extent of such employment discrimination is more fully set forth in the attached statement);

5. WHEREAS, such discrimination has resulted in the near exclusion of members of minority groups and females from the better and higher paying jobs in the electric and gas utility industry (Statistical evidence of such exclusion is more fully set forth in the attached statement);

6. WHEREAS, such discrimination violates the following laws: (1) Title VII of the Civil Rights Act of 1964, as amended; (2) the Civil Rights Act of 1866; (3) the Equal Pay Act of 1963; (4) Executive Orders 11246 and 11375; (5) the Fifth Amendment to the United States Constitution; (6) the national policy of protection of the public interest in the operations of the electric and gas utility industry, 15 U.S.C. 717(a) and 16 U.S.C. 824(a); (7) the legislative proscriptions against undue disadvantage and prejudice in the operations of the electric and gas utility industry, 15 U.S.C. 717c(b) and 16 U.S.C. 842d(b), and (8) the fair employment practices acts of more than thirty states;

7. WHEREAS, other Federal regulatory agencies have exercised jurisdiction over discrimination in the employment practices of their regulatees and still others have indicated their intention to do so (These actions and indications of intent are more fully set forth in the attached statement);

8. WHEREAS, the Federal Power Commission has already exercised jurisdiction over racial, ethnic and sex discrimination in the operations of the electric industry as they affect public accommodations (This action by the Commission is more fully set forth in the attached statement) AND

9. WHEREAS, the Federal Power Commission has both the jurisdiction and the duty under the provisions of the Fifth Amendment to the United States Constitution to prohibit employment discrimination in the operations of its regulatees (This duty is more fully set forth in the attached statement),

NOW, THEREFORE, the Petitioners respectfully pray the Commission to:

(1) Prescribe regulations prohibiting discrimination on account of race, color, religion, sex and national origin and assuring equal opportunity in the employment practices of its regulatees (A proposed rule is attached);

(2) Set public hearings and permit oral argument on such proposed rule;

(3) Initiate a notice and comment rulemaking proceeding with respect to such proposed rule; AND

(4) Grant such other relief as it deems necessary.

RESPECTFULLY SUBMITTED,

PETITIONERS,

by _____
William L. Taylor

by _____
Raymond B. Marcin
Center for National Policy Review
Catholic University Law School
Washington, D.C. 20017

THEIR ATTORNEYS

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Before the

FEDERAL POWER COMMISSION

Docket No. ————

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

MEMORANDUM IN SUPPORT OF THE PETITION AND PROPOSED RULE

TABLE OF CONTENTS

Page

Part I *BACKGROUND*

EARLY NEGRO EMPLOYMENT IN THE ELECTRIC AND GAS UTILITY INDUSTRY .....

THE ELECTRIC AND GAS UTILITY INDUSTRY TODAY .....

JOB OPPORTUNITIES IN THE GAS AND ELECTRIC UTILITY INDUSTRY .....

Part II *EVIDENCE OF DISCRIMINATION*

STATISTICAL EVIDENCE REVEALS A NATIONAL PROBLEM OF EMPLOYMENT DISCRIMINATION AGAINST MINORITIES AND WOMEN IN THE ELECTRIC AND GAS UTILITY INDUSTRY .....

A NATIONAL PROBLEM OF EMPLOYMENT DISCRIMINATION AGAINST MINORITIES AND WOMEN IN THE ELECTRIC AND GAS UTILITY INDUSTRY IS REFLECTED IN NUMBERS OF PENDING CASES .....

Part III *LEGAL ARGUMENT*

THERE IS A NATIONAL POLICY AGAINST EMPLOYMENT DISCRIMINATION .....

THE FEDERAL POWER AND NATURAL GAS ACTS .....

STATISTICAL EVIDENCE OF UNDERUTILIZATION OF MINORITIES AND WOMEN ESTABLISHES A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION .....

THE FEDERAL POWER COMMISSION HAS AMPLE AUTHORITY TO ISSUE REGULATIONS BARRING EMPLOYMENT DISCRIMINATION BY ITS REGULATEES .....

THE FIFTH AMENDMENT REQUIRES THE FEDERAL POWER COMMISSION TO ASSURE NONDISCRIMINATION IN THE EMPLOYMENT PRACTICES OF ITS REGULATEES .....

THE FEDERAL POWER COMMISSION HAS PROHIBITED ITS LICENSEES FROM DISCRIMINATING ON ACCOUNT OF RACE, COLOR, SEX, RELIGIOUS CREED AND NATIONAL ORIGIN IN PUBLIC ACCOMMODATIONS .....

OTHER FEDERAL REGULATORY AGENCIES HAVE EXERCISED JURISDICTION OVER EMPLOYMENT DISCRIMINATION .....

Part I. BACKGROUND

EARLY NEGRO EMPLOYMENT IN THE ELECTRIC AND GAS UTILITY INDUSTRY

Employment statistics in the electric and gas utility industry were not broken down according to race prior to 1920. Racial statistics for the industry were first published in that year and were limited to the labor and operative classifications. 8.3 per cent of the unskilled and semi-skilled employees in the electric utility industry and 12.8 per cent of the unskilled and semi-skilled employees in the gas pipeline industry were Negroes in 1920. By 1930, however, the percentages had fallen to 6.5 and 10.8, respectively. [Anderson, NEGRO EMPLOYMENT IN PUBLIC UTILITIES, (1970), p. 66].

Beginning in 1930, census figures were published which covered all electric and gas utility industry employees. In 1930, Negro employment amounted to 2.6 per cent in the electric power and 5.0 per cent in the gas and pipeline industry. In 1940, the figures were 2.0 and 3.7 per cent respectively, in 1950, 3.0 and 4.9 per cent, and in 1960 3.3 and 3.9 per cent. Between 1930 and 1960, then, Negro employment in the electric utility industry increased by seventh-tenths of a per cent, while during the same period in the gas and pipeline industry it decreased by 1.1 per cent. [Id., p. 76]. Overall, using combined figures for the electric power and gas and pipeline industry, Negro employment rose from 3.3 per cent in 1930 to 3.5 per cent in 1960, an increase of less than two-tenths of one per cent in thirty years. More precisely, Negroes held 3.32 per cent of all jobs in the electric and gas utility industry in 1930. By 1940 Negro representation in the industry had been reduced to 2.32 per cent. By 1950 Negro employment was 3.41 per cent, and from 1950 to 1960 there was only a negligible increase to 3.46 per cent.

1930 Census records clearly reveal that those Negroes who were employed in the electric and gas utility industry were at the bottom of the ladder in terms of job

desirability. Thus, although Negroes held only 3.3 per cent of all jobs in the industry, they held fully 14.2 per cent of the unskilled laborer jobs, 16.8 per cent of the charwomen jobs and 36 per cent of the janitor and porter jobs. [Anderson, NEGRO EMPLOYMENT IN PUBLIC UTILITIES (1970); p. 70, 71].

THE ELECTRIC AND GAS UTILITY INDUSTRY TODAY

Although the gas industry is the nation's oldest public utility, it does not seem to have experienced rapid growth until the years following World War II. However, between 1945 and 1967, the nation's total gas supply increased 410 per cent, the number of gas customers increased 95 per cent and the miles of distribution gas main increased 168 per cent. During the same period, the operating revenues of investor-owned gas companies increased 800 per cent. [Anderson, NEGRO EMPLOYMENT IN PUBLIC UTILITIES (1970); p. 38]. Today the FPC lists jurisdiction over more than 123 natural gas pipeline companies, 66 of which have operating revenues of $2½ million or more. [Federal Power Commission, STATISTICS OF INTERSTATE NATURAL GAS PIPELINE COMPANIES (1970)].

In contrast to the gas industry which grew rapidly only in the postwar period, the electric industry has experienced a long period of uninterrupted growth since early in the twentieth century. By 1968 sales of electric energy by investor owned electric utilities reached 1,105 billion kilowatt-hours and revenues totalled $19.4 billion. Today 98.8 per cent of all dwelling units in the United States have electric service, and the average home has 10 electric appliances. [Anderson, NEGRO EMPLOYMENT IN PUBLIC UTILITIES (1970), p. 16, 19]. The FPC lists 594 publicly owned and 212 privately owned electric utilities. [Federal Power Commission, STATISTICS OF PUBLICLY OWNED ELECTRIC UTILITIES IN THE UNITED STATES (1969) and STATISTICS OF PRIVATELY OWNED ELECTRIC UTILITIES IN THE UNITED STATES (1969)].

JOB OPPORTUNITIES IN THE GAS AND ELECTRIC UTILITY INDUSTRY

As the numbers and wealth of member companies indicate, the electric and gas utility industry is, today, a fertile source of employment opportunity.

The Bureau of the Census listed 634,000 jobs in the industry in 1970, with 285,000 in electric companies and systems, 162,000 in gas companies and systems and 187,000 in combination companies and systems. Of these 545,000 are production workers with an average hourly wage of $4.21 in electric companies and systems, $3.82 in gas companies and systems and $4.52 in combination companies and systems. [U.S. Dept. of Commerce, Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES (1971), p. 221].

Of the blue collar or physical workers in the industry, fully sixty per cent are craftsmen (skilled) with an average hourly wage of $4.67. Operatives (semiskilled) comprise eleven per cent of the blue collar force and earn an average of $3.95 an hour. Laborers constitute thirteen per cent and earn $3.38 an hour on the average. Service workers, who comprise four per cent of the blue collar force earn the least—$2.91 an hour on the average. In addition ten per cent of the clerical workers are classified as blue collar by the Bureau of Labor Statistics (Meter readers and stock clerks) and they average $3.65 an hour. [Robinson, OCCUPATIONS IN THE GAS AND ELECTRIC UTILITIES INDUSTRY; Research Studies Division, Equal Employment Opportunity Commission; appendix B].

Job opportunities in the blue collar fields of the electric and gas utilities industry are, according to an EEOC study, greater than in other industries:

> Basically, a high school graduate begins in a low skill, entry level job, usually as a helper or laborer, and through on-the-job training masters the higher skills of a craft position. Generally, the most important of the plant positions are filled from within by workers who have started at the bottom. The op-

> portunities for advancement in this industry are potentially greater than in other industries because, with a heavy dependence on in-house training and the uniqueness of the skills required in this industry, relatively few workers are able to transfer skills acquired in other industries into high skill, high level craft jobs in this industry. [*Id.*, at p. 17].

Because of the specialized skills required in the blue collar occupations in the industry, employment in that area would seem to afford relatively stable and secure positions.

In the white collar field, in which the average hourly wage is $3.10, stenographers, secretaries and typists account for more than two-fifths of the jobs. Another fifth are accounting clerks and one-tenth are cashiers. [*Id.*, p. 5]. Of the clerical positions studied by EEOC, none was an occupation peculiar to the electric and gas utilities industry. [*Ibid.*] This is in contrast to the blue collar jobs which, as indicated above, involved relatively unique skills. Clerical work in the electric and gas utilities industry, then, would seem to afford opportunities to learn marketable skills, thus enlarging one's employment mobility. The converse of this, of course, is true; i.e. basic clerical skills learned in other industries are transferable to the electric and gas utility industry.

Part II. EVIDENCE OF DISCRIMINATION

STATISTICAL EVIDENCE REVEALS A NATIONAL PROBLEM OF EMPLOYMENT DISCRIMINATION AGAINST MINORITIES AND WOMEN IN THE ELECTRIC AND GAS UTILITY INDUSTRY

In March of 1971 the Bureau of Labor Statistics of the United States Department of Labor (BLS) listed 633,600 people working in the electric and gas utility industry. [U.S. Dept. of Labor, Bureau of Labor Statistics, EMPLOYMENT AND EARNINGS; March, 1971].

I. The United States Equal Employment Opportunity Commission (EEOC), using data aggregated from its

1970 EEO-1 Reports covering eighty-six per cent of all people working in the industry, placed the electric and gas utility industry at the very bottom of its list of all major industries with respect to BLACK employment participation. The following table illustrates EEOC's finding:

PARTICIPATION RATES OF BLACK WORKERS IN INDUSTRY GROUPS REPORTING 500,000 OR MORE EMPLOYEES, 1970

Industry	Participation Rates of Black Workers
Medical Services	15.9
Miscellaneous Business Services	14.7
Primary Metals	13.2
Textiles	13.7
Food and Kindred Products	13.0
Transportation Equipment	11.0
Apparel	10.8
Educational Services	10.3
Fabricated Metal Products	10.0
Paper and Allied Products	9.6
Communication	9.0
Banking	8.8
Chemicals and Allied Products	8.6
Trucking and Warehousing	8.3
Wholesale Trade	8.2
Food	8.1
Electrical Machinery, Equipment and Supplies	8.1
Railroads	7.8
Insurance	7.6
Retail Trade	7.1
Printing and Publishing	6.4
Non-electrical Machinery	6.4
Utilities	6.1

[Thomas, EMPLOYMENT PATTERNS IN THE GAS AND ELECTRIC INDUSTRIES: Research Report No. 35, November 1971; Equal Employment Opportunity Commission; p. 10]

The low participation of black workers in the electric and gas utility industry is placed in keener focus when measured against the 10.1 per cent all industries record

of black participation. A further breakdown of the 6.1 per cent into job categories reveals that blacks are concentrated in the low paying, less desirable positions in the industry:

> While the overall participation rate for black workers was strikingly low, the situation was even worse for black workers in white-collar employment. Less than 4 percent of all white-collar workers were black and four out of every five of these were office and clerical workers. Further examination of the industry's statistical profile on employment reveals that less than one percent of its 105,000 officials, managers and professionals are black. [*Id.*, p. 11]

Black workers are concentrated in the blue collar jobs in the industry, and, even there, they seem to occupy the bottom rung of the ladder of desirability:

> Twenty-six percent of the laborers are black, eighteen percent of the operatives are black and three percent of the craftsmen are black. [*Id.*, p. 12]

The following table illustrates the 1970 participation rate of black employees in the electric and gas utility industry and compares that rate with the all-industries black participation rate:

	Blacks	
	Utilities	All Industries
Total	6.1	10.1
White Collar	3.7	4.7
Officials and Managers	0.6	1.9
Professionals	1.0	2.5
Technicians	2.1	6.2
Salesworkers	1.3	4.3
Office and Clerical	7.0	7.2
Blue Collar	7.3	13.1
Craftsmen	2.5	5.6
Operatives	10.3	14.1
Laborers	25.8	21.8
Service Workers	33.2	26.3

SOURCE: Data aggregated from EEO-1 reports, Equal Employment Opportunity Commission. [*Id.*, appendix]

It is true that overall black participation in the industry has increased from 3.7 per cent six years ago to the present 6.1 per cent. EEOC, however, assigns the increases to the lower paying, less prestigious office and clerical job category, with negligible increases in the more desirable categories and a decline in the numbers of black craftsmen.

II. SPANISH SURNAMED AMERICANS have a 1.6 per cent participation rate in the electric and gas utility industry. This figure is placed in proper focus when measured against the fact that Spanish Americans constitute five per cent of the total population and between four and five per cent of the civilian labor force. Spanish surnamed Americans are also concentrated in the low paying, less desirable positions in the industry.

> They hold only 1.4 percent of the white collar positions and two out of every three of these are office and clerical jobs. Spanish Surnamed Americans hold less than 1.0 percent of the official, managerial and sales positions. One and one-half percent of all technicians are Spanish Surnamed Americans.
>
> Spanish Surnamed Americans fare slightly better in the blue-collar occupations, but the difference is so slight that it is hardly worth mentioning. The electric and gas utilities have a blue-collar workforce that is 1.9 percent Spanish Surnamed American. This compares to a national figure for all industries of 4.9 percent. [*Id.*, p. 15, 16] •

The following table illustrates the 1970 participation rate of Spanish surnamed American employees in the electric and gas utility industry and compares that rate with the all-industries Spanish surnamed American participation rate:

	SSA's	
	Utilities	All Industries
All Employees	1.6	3.6
White Collar	1.4	1.9
Officials and Managers	.5	1.0
Professionals	.9	1.1
Technicians	1.5	2.2
Sales Workers	.5	2.1
Office and Clericals	2.1	2.6
Blue Collar	1.9	4.9
Craftsmen	1.2	3.0
Operatives	2.6	4.6
Laborers	3.7	8.5
Service Workers	2.9	5.9

SOURCE: Data aggregated from EEO-1 reports, Equal Employment Opportunity Commission. [*Id.*, appendix]

III. The participation rate for WOMEN in the electric and gas utility industry is strikingly low:

> Women constitute slightly more than half of the total population, thirty-eight percent of the labor force and 14.8 percent of the workforce of the gas and electric utilities. Women appear to have been denied blue-collar jobs outright, and their participation in the higher level of white collar jobs is minimal. [*Id.*, p. 18]

The following table illustrates 1970 male and female occupation distribution in the electric and gas utility industry:

OCCUPATIONAL DISTRIBUTION BY SEX
(PERCENTAGE)

	Male	Female
All Occupations	100.0	100.0
White Collar	42.4	95.1
Officials and Managers	13.8	1.3
Professionals	8.1	2.5
Technicians	7.5	1.5
Sales	2.4	1.8
Office and Clerical	10.4	87.9
Blue Collar	55.5	2.1
Craftsmen	31.1	.3
Operatives	19.5	1.4
Laborers	4.8	.4
Service Workers	2.0	2.9

[*Id.*, p. 19]

The following table illustrates the 1970 participation rate of female employees in the electric and gas utility industry and compares that rate with the all-industries female participation rate:

Occupational Distribution of Female Workers

	Utilities	All Industries
All Employees	100.0	100.0
White Collar	95.1	60.1
Officials and Managers	1.3	2.6
Professionals	2.5	5.9
Technicians	1.5	3.3
Sales Workers	1.8	10.0
Office and Clericals	87.9	38.0
Blue Collar	2.1	29.9
Craftsmen	0.3	2.7
Operatives	1.4	19.9
Laborers	0.4	7.3
Service Workers	2.9	10.0

SOURCE: Data aggregated from EEO-1 reports, Equal Employment Opportunity Commission. [*Id.*, appendix]

Although the numbers of blacks and Spanish surnamed Americans in the industry increased between 1966 and

1970, the numbers of women in the industry actually declined in the same period. [*Id.*, p. 18].

IV. While the above national figures and percentages clearly reveal the existence of a nationwide problem of employment discrimination in the electric and gas utility industry, an analysis of various LOCAL LABOR MARKET COMPARISONS can serve to bring the nature and extent of the problem into sharper focus. The following tables illustrate 1970 black and Spanish surnamed American participation in the gas and electric utility industry in many of the nation's metropolitan areas:

BLACK EMPLOYMENT IN THE UTILITIES INDUSTRY FOR SELECTED STANDARD METROPOLITAN STATISTICAL AREAS

	Percent Black		
SMSA	Population 1970	Employment All Industries	Employment Utilities Industry
Atlanta	22.3	16.4	11.5
Beaumont	21.4	12.8	13.1
Birmingham	29.5	22.8	13.5
Chicago	17.6	15.1	7.6
Dallas	24.9	11.8	6.1
Detroit	18.0	16.8	6.6
Fort Worth	10.9	9.2	6.1
Houston	19.3	14.2	7.5
Indianapolis	12.4	9.4	4.0
Jackson, Mississippi	37.2	26.6	7.3
Kansas City	12.1	10.4	4.8
Miami	15.0	11.5	4.3
New Orleans	31.0	21.5	12.7
New York	16.3	12.3	9.7
Newark	18.8	12.5	6.0
Orlando	14.6	10.8	3.4
Philadelphia	17.5	14.6	7.3
St. Louis	16.0	12.9	4.7
Shereveport	32.8	24.8	5.4
Tampa	10.8	10.6	6.5
Washington, D.C.	24.6	23.4	20.9
Wilmington	21.2	9.7	2.4

SOURCES: Preliminary figures, U.S. Department of Commerce, Bureau of the Census. Data aggregated from 1970 EEO-1 reports. [*Id.*, p. 22]

SPANISH SURNAMED AMERICAN EMPLOYMENT IN THE UTILITIES INDUSTRY FOR SELECTED STANDARD METROPOLITAN STATISTICAL AREAS

SMSA [Note: 1970 Population percentages for Spanish Surnamed Americans were not yet available from Census data]	Percent Spanish Surnamed American Employment	
	All Industries	Utilities Industry
Beaumont	1.7	0.4
Chicago	4.9	0.4
Dallas	4.1	3.9
Forth Worth	4.3	5.9
Houston	6.3	2.1
Miami	17.1	4.3
New Orleans	3.2	0.3
New York	7.2	3.0
Newark	3.9	0.8
Tampa	4.4	3.4

SOURCE: Data aggregated from 1970 EEO-1 reports, Equal Employment Opportunity Commission. [*Id.*, p. 23]

V. In November, 1971, EEOC issued A POSITION PAPER ON THE SELECTION OF THE ELECTRIC AND GAS UTILITIES INDUSTRY AS THE SUBJECT FOR A PUBLIC HEARING HELD BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. The above data were summarized on pages 5, 6 and 7 of that paper:

1. The black participation rate in this industry is the lowest (6.1%) among the twenty-three industries reporting employment of 500,000 or more.

2. One-third of all utility establishments filing EEO-1 reports with the Commission in 1970 had no black employees.

3. In only three of twenty large SMSAs (standard metropolitan statistical areas) did the black participation rate in utilities approach or exceed the participation rate for all industries in the area. In 8 of the same 20 SMSAs, the all-industry black participation rate was at least double the black participation rate in local utilities.

4. In 1970, Spanish Surnamed Americans held 3.6 percent of all jobs reported in the EEO-1 nationwide survey, but they held only 1.6 percent of all jobs in the utilities industry.

5. Spanish Surnamed Americans held less than 1 percent of the official, managerial, professional and sales jobs and only 1.5 percent of all technicians jobs.

6. In many SMSAs Spanish Surnamed Americans have relatively low participation rates in the utilities industry when compared to their participation rate in all industries in the local labor market. Most striking in this kind of comparison is the city of Chicago where Spanish Surnamed Americans held 0.4 percent of the jobs in the gas and electric utilities at the same time that they held approximately 5 percent of all jobs in the Chicago area.

7. While women held 34% of the positions reported in EEOC's overall survey in 1970, only 15% of this industry's employees were female.

8. Nine of every ten females employed in this industry were clerical workers.

9. Less than 2% of the blue collar jobs were held by women.

The above statistics confirm that a national problem of underutilization of black, Spanish surnamed and female Americans exists in the electric and gas utility industry.

A NATIONAL PROBLEM OF EMPLOYMENT DISCRIMINATION AGAINST MINORITIES AND WOMEN IN THE ELECTRIC AND GAS UTILITY INDUSTRY IS REFLECTED IN NUMBERS OF PENDING CASES

Statistical evidence is one of the most important methods of guaging the extent of the problem of employment discrimination in the electric and gas utility industry. An additional measure of the problem can be obtained by examining the numbers and diversity of pending

cases involving charges of discrimination. The following is a compilation of cases involving allegations of employment discrimination pending against electric or gas utility companies before state fair employment practices commissions:

Oklahoma—Investigations are pending in cases filed with the Oklahoma Human Rights Commission against the National Gas Pipeline Company (HRC 81-72; 12/18/71; sex) and the Western Electric Company (HRC 90-72; 12/9/71; sex and HRC 12-72; 1/24/72; race or color).

Wisconsin—The Wisconsin Department of Industry, Labor and Human Relations lists three cases presently pending against utilities: 321 R 138,412 R 180 and 417 R 183. All of the cases involve allege racial discrimination and they were filed in August and December, 1971.

West Virginia—The West Virginia Human Rights Commission is currently processing two cases against power companies (E 174-71; May 14, 1971; race) and (E 140-71; October 8, 1971; race).

Disrict of Columbia—The District of Columbia Office of Human Rights has three presently pending complaints against electric or gas utilities, two against PEPCO (PP-872; October 16, 1970; race, creed, color, national origin and sex) and (PE-1255; January 6, 1972; race) and one against the Washington Gas Light Company (PP-970; January 27, 1971; race, creed, color, national origin and sex). In addition, the former complaint against PEPCO and the complaint against the Washington Gas Light Company are of a systematic or class nature.

New York—The State of New York's Division of Human Rights has three presently pending complaints of discrimination concerned with the electric and gas utility industry, two against the Niagara Mohawk Power Corporation (CC-20112-70; 1/30/70; race and national origin) and (C-21946-70; 9/15/70; national origin) and one against the N.Y. State Electric and Gas Corporation (CS-25561-71; 11/8/71; sex). In addition,

the former complaint against the Niagara Mohawk Power Corporation is of a class nature.

Washington—The Washington State Board Against Discrimination has a complaint of a class nature pending against the Snohomish County Public Utility District (ES-1529; August 31, 1971; race and sex).

California—The California Fair Employment Practice Commission has a number of cases pending against the City of Los Angeles Dept. of Water and Power (FEP 70-71-B6768; 4/22/71; race), (FEP 70-71-B6824; 5/6/71; race), (FEP 70-71-B-6944; 6/10/71; national origin), (FEP 70-71-B1-1013; 6/30/71; race), (FEP 71-72-B7-004; 7/2/71; race), (FEP 71-72-B7-053; 7/19/71; race), (FEP 71-72-B7-070s; 7/22/71; sex), (FEP 71-72-B7-071s; 7/22/71; sex), (FEP 71-72-B7-097s; 8/3/71; sex), (FEP 71-72-B7-188; 9/3/71; race), (FEP 71-72-B7-370s; 11/11/71; sex), (FEP 71-72-B7-424; 12/2/71; race), (FEP 71-72-B7-590; 2/24/72; race), (FEP 71-72-B7-596s; 2/25/72; sex) and (FEP 71-72-B7-605s; 2/28/72; sex); four against the Southern California Edison Company (FEP 70-71-B6935; 6/8/71; race), (FEP 70-71-B6995; 6/25/71; race), (FEP 71-72-B7-328; 10/28/71; race), (FEP 71-72-B7-337; 11/2/71; race); two against the Pacific Gas and Electric Company (FEP 71-72-A7-396; 2/9/72; race) and (FEP 71-72-A7324; 12/29/71; race), and one against the Southern California Gas Company (FEP 71-72-B7-439; 12/14/71; race). In addition, a staff investigation recently resulted in charges of discrimination against minorities and women in the employment practices of the Southern California Edison Company, the Pacific Gas and Electric Company and the Western Pacific Railroad Company. (The Wall Street Journal; Friday, March 3, 1972).

New Jersey—The New Jersey Department of Law and Public Safety's Division on Civil Rights lists several complaints pending against electric and gas utilities: Against the Public Service Electric Company—(AG14-NB-0365; 8/3/71; national origin); against the Public Service Electric and Gas Company—(AG09RB-0402; 11/9/71; race), (AG14RB-0403; 11/10/71; race), (AG14RB-0404; 11/10/71; race), (AG14SB-0405; 11/

10/71; sex), (AG14RB-0406; 11/10/71; race), (E09BW-5610; 4/2/71; multiple), (EG14SB-6351; 12/27/71; sex) and EL11RB-6377; 1/4/72; race), against the New Jersey Natural Gas Company—(XN03WB-0046; 8/6/71; multiple), and against the A.C. Electric Company—(XA02BW-0050; 8/6/71; multiple).

Colorado—The Colorado Civil Rights Commission has two pending complaints on file against the Public Service Company of Colorado, (E-58[70-72]; 8/4/71; race) and (E-432[71-72]; 1/24/72; open class). The latter, as is indicated, is of a class nature.

Kansas—The Kansas Commission on Civil Rights has two cases pending against the Kansas Gas and Electric Company (E90-72W; 12/13/71; race) and E93-72W; 1/12/72; race).

Missouri—The Missouri Commission on Human Rights lists complaints pending against the Gas Service Company (E-9/91-3103; 9/20/71; race/color); against Western Electric (E-9/71-3095(F); 9/13/71; race/color), (E-1/71-2524(F); 1/29/71; race/color), (E-2/71-2574 (F); 2/18/71; race/color), (E-6/71-2877(F); 6/4/71; sex), (E-7/71-2998(F); 7/27/71; race/color), (E-12/71-3381(F), 12/10/71; race/color), (E-2/72-3510; 2/3/72; sex) and (E-2/72-3537(F); 2/10/72; race/color), and against Union Electric (E-4/71-2808; 4/29/71; race/color), (E-1/72-3441; 1/12/72; race/color), (E-1/72-3442; 1/12/72; sex), (E-2/72-3532; 2/10/72; ancestry), (E-2/72-3607(F); 2/8/72; sex) and (E-2/72-3612(F); 2/8/72; national origin).

Indiana—The Indiana Civil Rights Commission has cases pending against the Indiana Gas Co. (1983; 12/16/71; race); the Citizens Gas Co. (1892; 11/27/71; race) and the Indiana and Michigan Electric Co. (2267; 3/7/72; race).

Part III. LEGAL ARGUMENT

THERE IS A NATIONAL POLICY AGAINST EMPLOYMENT DISCRIMINATION

There is a national policy against discrimination in employment on the basis of race, color, religion, sex or

national origin. This policy is particularly embodied in Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e), and Executive Orders 11246 and 11375 (42 U.S.C. 2000e). In addition to Federal requirements, employment discrimination on the grounds of race, color, religion and national origin is outlawed under the statutes of more than thirty States. [Alas. Stat. §§ 18.80.010, -.30, §§ 23.10.192 (Supp. 1966); Ariz. Rev. Stat. Ann. §§ 41-1401, -1485 (Supp. 1965); Cal. Labor Code Ann. §§ 1410-32 (1964); Colo. Rev. Stat. §§ 80-21-1, -8 (1963); Conn. Gen. Stat. Ann. §§ 31-126, -128 (1960); D.C. Police Regs. art. 47 (1965); Hawaii Rev. Laws §§ 90A-1, -9 (Supp. 1965); Ill. Rev. Stat. ch. 48, §§ 851-66 (1963); Ind. Stat. Ann. §§ 40-2307, -2317 (1965); ch. 121 (1965) Iowa Laws 195; Kan. Gen. Stat. Ann. §§ 44-1001, -1041 (Supp. 1961); ch. 2, (1966) Ky. Acts; Md. Ann. Code art. 49B, §§ 1-19 (Supp. 1965); Mass. Ann. Laws ch. 6 § 56 (Supp. 1966), ch. 151B (1966); Mich. Stat. Ann. § 17.458 (1960); Minn. Stat. Ann. §§ 363.01, .13 (1966); Mo. Rev. Stat. §§ 296.010, 070 (Supp. 1965); ch. 276 (1965) Neb. Laws 782; N.H. Rev. Stat. Ann. §§ 354A:1, :14 (1966); N.J. Rev. Stat. 1937, § 18:25-1, -28 (Supp. 1966); N.M. Stat. Ann. §§ 59-4-1, -14 (1960); N.Y. Exec. Law §§ 290-301 (McKinney Supp. 1966); Ohio Rev. Code Ann. §§ 4112.01, .99 (Page 1965); Ore. Rev. Stat. §§ 659.010, .115 § 659.990 (1965); Pa. Stat. Ann. tit. 43 §§ 951-63 (1964); R.I. Gen. Laws §§ 28-5-1, -39 (1956); ch. 6, (1965) Utah Laws 173; Wash. Rev. Code §§ 49.60.010, .320 (1962); W. Va. Code ch. 5, art. 11; Wis. Stat. Ann. §§ 111.31, 37 (Supp. 1967); ch. 170, (1965) Wyo. Laws 445.]

THE FEDERAL POWER AND NATURAL GAS ACTS

The primary mission of the FPC is to safeguard the *public interest* by regulating the businesses of interstate wholesale sales of electrical energy and natural gas. The FPC's regulatory mandate extends to matters relating to the transmission and sale of electric energy and natural gas *interstate commerce.*

> It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. [Section 201 of the Federal Power Act; 49 Stat. 847; 16 U.S.C. 824(a)]
>
> . . . [I]t is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [Section 1(a) of the Natural Gas Act; 52 Stat. 821 (1938); 15 U.S.C. 717(a)].

With respect to natural gas companies, the FPC furthers its public interest mandate by requiring that companies which transport or sell natural gas or undertake constructions or extensions of facilities secure *certificates of public convenience and necessity.* [Section 7(c) of the Natural Gas Act; 15 U.S.C. 717f(c)].

With respect to electric companies, the FPC furthers its public interest mandate by *licensing* hydroelectric plants. [Section 4 of the Federal Power Act; 16 U.S.C. 797(e)].

In addition, natural gas companies may not abandon any of their facilities or any service rendered by means of facilities subject to the FPC's jurisdiction unless the FPC gives its approval. FPC approval is by law premised, inter alia, upon public convenience or necessity. [Section 7(b) of the Natural Gas Act; 15 U.S.C. 717f (b)].

Electric companies under FPC jurisdiction may not sell, lease or otherwise dispose of their major facilities or merge their major facilities with those of any other person or purchase, acquire or take any security of any other public utility unless the FPC issues an order authorizing them to do so. FPC authorization is by law premised, inter alia, upon the public interest. [Section 203(a) and (b) of the Federal Power Act; 16 U.S.C. 824b(a) and (b)].

Finally, the FPC, of course, regulates the rates which may be charged by natural gas and electric companies. [See Section 5 of the Natural Gas Act; 15 U.S.C. 717d and Section 206 of the Federal Power Act; 16 U.S.C. 824e].

Both natural gas companies and electric companies under FPC jurisdiction are prohibited by law from making or granting any undue preference or advantage to any person and from subjecting any person to any undue prejudice or disadvantage, with respect to interstate wholesale sales of electricity or natural gas. [See Section 4(b) of the Natural Gas Act; 15 U.S.C. 717c(b) and Section 205(b) of the Federal Power Act; 16 U.S.C. 824d(b)].

STATISTICAL EVIDENCE OF UNDERUTILIZATION OF MINORITIES AND WOMEN ESTABLISHES A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION

> In the problem of racial discrimination, statistics often tell much and the Courts listen. [*State of Alabama* v. *United States*, 304 F. 2d 583, 586 (5th Cir. 1962), affirmed 371 U.S. 37 (1962)]

Courts have often held statistical disparities in the utilization of minorities to establish a prima facie case of employment discrimination.

> We hold as a matter of law that these statistics which revealed an extraordinarily small number of black employees, except for the most part as menial laborers, established a violation of Title VII of the

Civil Rights Act of 1964. [*Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 426 (8th Cir. 1970)]

The United States Supreme Court relied on statistics to find unlawful employment discrimination in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, n. 6 (1971). See also the following cases which rely on statistics in establishing employment discrimination: *United States* v. *Hayes International Corporation*, 415 F. 2d 1038, 1040, 1043 (5th Cir. 1969). *United States* v. *Virginia Electric and Power Company*, 3 FEP Cases 529 (E.D. Va. 1971). *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245, 247 (10th Cir. 1970). *United States* v. *Georgia Power Company*, 3 FEP Cases 321, 322 (N.D. Ga. 1970). *Quarles* v. *Phillip Morris, Inc.*, 279 F. Supp. 505, 508 (E.D. Va., 1968). *United States* v. *Sheet Metal Workers*, 416 F. 2d 123, 127, n. 7 (8th Cir. 1969). *Irvin* v. *Mohawk Rubber Company*, 308 F. Supp. 152 (E.D. Ark. 1970).

The above cases and others have developed the proposition that a substantial statistical dispartity establishes, prima facie, a case of employment discrimination. The employment statistics in the electric and gas utility industry as a whole evince sufficient disparity to establish such a case on an industrywide, nationwide basis.

THE FEDERAL POWER COMMISSION HAS AMPLE AUTHORITY TO ISSUE REGULATIONS BARRING EMPLOYMENT DISCRIMINATION BY ITS REGULATEES

On September 17, 1971, the Assistant Attorney General in charge of the Civil Rights Division of the Justice Department, in a letter to the General Counsel of the Federal Power Commission, held that the Federal Power Commission has clear authority to issue regulations barring employment discrimination by natural gas companies regulated by the Commission and by electric companies holding hydroelectric plant licenses and arguable authority with respect to electric companies whose whole-

sale interstate rates are regulated but which have no hydroelectric licenses. [LETTER from David L. Norman, Assistant Attorney General, Civil Rights Division, to Mr. Gordon Gooch, General Counsel, Federal Power Commission; September 17, 1971].

After noting that the Federal Communications Commission had issued equal employment regulations and that the Interstate Commerce Commission was presently considering doing so, Mr. Norman went on to provide the legal bases for the Justice Department's opinion:

> 1. In determining whether to grant a certificate of public convenience and necessity under the Natural Gas Act, the Commission is invested with discretion, *California Gas Producers Ass'n.* v. *FPC*, 383 F.2d 645 (C.A. 9, 1967) and must evaluate all factors bearing on the public interest. *FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1 (1963); *Atlantic Refining Co.* v. *Public Service Comm'n.*, 360 U.S. 378 (1959). Such factors include matters of fundamental national policy, *City of Pittsburgh* v. *FPC*, 237 F.2d 741 (C.A.D.C., 1956); *National Coal Ass'n* v. *FPC*, 191 F.2d 462 (C.A.D.C., 1951); *FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1 (1963); *Consolidated Edison Co.* v. *FPC*, 271 F.2d 942 (C.A. 3, 1959), and the Commission, in making its determination has considered, for instance, government antitrust policy, *City of Pittsburgh* v. *FPC*, 237 F.2d 741 (C.A.D.C., 1956), national defense concerns, *National Coal Ass'n.* v. *FPC*, 191 F.2d 462 (C.A.D.C., 1951) and air pollution, *Consolidated Edison Co.* v. *FPC*, 271 F.2d 942 (C.A. 3, 1959). Since the elimination of discrimination in employment is a national policy of high priority, [see, e.g., *United States* v. *Gustin-Bacon Div. of Certain-Teed Products Corp.*, 426 F.2d 539 (C.A. 10, 1970)], an applicant's employment policies are relevant to the Commission's determination.
>
> Title VII of the Civil Rights Act of 1964 makes it unlawful for private employers with twenty-five or more employees to engage in employment prac-

tices which discriminate on account of race, color, religion, sex or national origin. In *California* v. *FPC*, 369 U.S. 482 (1961), the Supreme Court held that an applicant's compliance or noncompliance with the laws of the United States is relevant in deciding whether the public convenience and necessity would be served by issuance of a certificate to a company engaged in the production or transmission of natural gas. Thus it seems clear that the FPC may consider a company's employment policies in making a decision concerning the issuance of certificates. Correlatively, under 16 U.S.C. § 717f(e) the Commission may issue a regulation requiring regulatees to comply with an equal employment policy as a reasonable term and condition required by the public convenience and necessity. Thus, in our opinion, the Commission has the authority under the Natural Gas Act to issue an equal employment regulation. Cf. Reports and Orders of the Federal Communications Commission, 33 Fed. Reg. 9960 (1968); 34 Fed. Reg. 9284 (1969); 35 Fed. Reg. 8825 (1970).

As a constitutional matter, in analogous situations, courts have held private businesses subject to Fifth and Fourteenth Amendment obligations because of the extensive governmental regulation of their activities. *Public Utilities Comm'n.* v. *Pollak*, 343 U.S. 451 (1952); *Washington Gas Light Co.* v *Virginia Electric Power Co.*, 438 F.2d 248 (C.A. 4, 1971). Further, where the government is a joint participant in an activity with private persons, courts have held that there is an affirmative obligation on the part of the government to insure compliance with constitutional provisions. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Ethridge* v. *Rhodes*, 268 F. Supp. 83 (D. Ohio 1967); *United States* v. *Frazer*, 297 F. Supp. 319 (M.D. Ala. 1969).

2. In our opinion the Commission has the authority under the Federal Power Act to issue equal employment regulations with respect to those companies licensed by the Commission to operate hydroelectric plants.

Electric companies holding licenses to operate hydroelectric plants have been granted an exclusive right to use part of the public domain. *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940); *Udall* v. *FPC*, 387 U.S. 428 (1967). The license is a privilege granted on the theory that there will be a resulting benefit to the public in the licensee's use of the waters. *Alabama Power Co.* v. *FPC*, 128 F.2d 280 (C.A.D.C.), *cert. denied*, 317 U.S. 652 (1942). The Commission's duty in a licensing case is to explore all issues relevant to the public interest and determine whether the grant of a license is in the public interest. *Udall* v. *FPC*, 387 U.S. 428 (1967). Compliance with public policies of high priority and with legal requirements is relevant in determining what action is in the public interest. *California* v. *FPC*, 369 U.S. 482 (1961); *City of Pittsburgh* v. *FPC*, 237 F.2d 741 (C.A.D.C., 1956). Under the Commission's statutory power to impose conditions upon the grant of licenses, a power which gives the Commission broad authority to effect the public interest, *Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153 (C.A.D.C., 1967), the Commission may require that electric companies follow nondiscriminatory employment practices. Cf. Reports and Orders of the Federal Communications Commission, 33 Fed. Reg. 9960 (1968); 34 Fed. Reg. 9284 (1969); 35 Fed. Reg. 8825 (1970).

An equal employment regulation may be made applicable to present licensees as well as to applicants seeking a license. In fulfilling a continuing obligation to comply with the Act, a licensee may be required to comply with rules and regulations made subsequent to the issuance of the license. See, e.g., 32 Fed. Reg. 11640 (1967).

3. With respect to electric companies whose wholesale interstate rates are regulated but which have no hydroelectric license, the authority for issuing a regulation regarding equal employment is less clear. As with the companies engaged in natural gas ac-

tivities, the Fourteenth Amendment may apply to these electric companies because of the extensive governmental regulation of their activities, *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952), *Washington Gas Light Co.* v. *Virginia Electric Power Co.*, 438 F.2d 248 (C.A. 4, 1971), but since the companies are regulated primarily by state and local rather than federal authorities, the existence of a duty on the part of the federal government to insure the companies' compliance with its constitutional obligations is unclear. We defer to your judgment and that of the Commission in this matter.

4. In our opinion the Commission has authority to regulate the equal employment practices of pipeline companies and producers and electric companies holding hydroelectric plant licenses, and is not limited to regulating equal employment practices at facilities which are themselves licensed. Pipeline companies and producers must obtain certificates of public convenience and necessity in order to transport or sell natural gas in interstate commerce. Since it is a company that applies for and receives a certificate, and since the Commission's determination is that it is in the public interest for the particular company to engage in the activity, the Commission has authority to regulate the employment activities of the entire company. We would think it proper, however, in the case of large integrated corporations for the Commission, if it sees fit, to limit the application of a regulation to the natural gas subsidiary or the natural gas operations of the corporation. Regarding electric companies holding hydroelectric plant licenses, we believe it would be an unduly narrow interpretation of authority to limit the applicability of an equal employment regulation to licensed facilities. Since an electric company must apply for a license and the Commission, before granting a license, must find it in the public interest for the particular utility company to hold a license, the entire company's equal employment practices may be

regulated. Cf. Exec. Order 11246, § 202, 30 Fed. Reg. 12319 (1965).

5. In reply to your question on FPC's jurisdiction to compel consumers to pay increased rates, Title VII of the Civil Rights Act of 1964 made it unlawful for any employer with twenty-five or more employees to engage in discriminatory employment practices. The companies which you regulate have had equal employment obligations for some time and we see no reason why the promulgation of an equal employment regulation should result in any increase in consumer rates.

6. Concerning the question of termination of services or denial of a license, there are a variety of means of enforcing an equal employment regulation which accommodate both proper implementation of a regulation and your Commission's other responsibilities. See, e.g., Exec. Order 11246, § 209(a), 30 Fed. Reg. 12319 (1965). For instance, where there is competition for a license, the license may be awarded to the company that has demonstrated a willingness to comply with an equal employment policy. Where denial of a license or certificate may have severe adverse effects on the public, the Commission might refer the case to the Department of Justice to compel compliance with the regulation through civil litigation.

In *Potomac Electric Power Co. (PEPCO)* v. *Public Service Commission of the District of Columbia* (C.A. No. 2382-70/2384-70; D.D.C. Feb. 23, 1971), the issue as to whether the Public Service Commission had the authority to examine PEPCO's employment pattern from the point of view of race was raised. On petition from the National Urban League, the Commission ordered PEPCO's rate increase to be conditioned upon its achieving fair employment practices. PEPCO appealed. The United States District Court for the District of Columbia held:

> Because Pepco is a private utility pursuing an essentially governmental function, guaranteed a stated

rate of return on its investment, and regulated in the public interest, the Court concludes that the Commission had authority and power to examine Pepco's employment practices, either as a part of a rate proceeding or as an independent matter. [*Ibid.*]

THE FIFTH AMENDMENT REQUIRES THE FEDERAL POWER COMMISSION TO ASSURE NONDISCRIMINATION IN THE EMPLOYMENT PRACTICES OF ITS REGULATEES

The Justice Department has acknowledged that the Federal Power Commission is clearly *authorized* to issue employment discrimination regulations binding upon its regulatees. Judicial interpretations of the Fifth and Fourteenth Amendments, however, make it clear that federal regulatory agencies such as the FPC are not only *authorized* but also *obliged* to assure nondiscrimination in all aspects of the operations of the industries they regulate, including employment practices. [See U.S. Commission on Civil Rights, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 1971; Legal Appendix, p. 365 et seq.]

That the strictures imposed upon states by virtue of the Equal Protection Clause of the Fourteenth Amendment apply as well to agencies and instrumentalities of the federal government by virtue of the Due Process Clause of the Fifth Amendment has not been seriously doubted since *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Thus, discriminatory practices, which, on the state level, violate the Equal Protection Clause are also prohibited, on the federal level, by the Due Process Clause of the Fifth Amendment. [*Id.*, 499.]

Before delving into the question of the applicability of the constitutional requirement of nondiscrimination to federal regulatory agencies, an analysis of the type of governmental activity or involvement which gives rise to the requirement will be useful. It is clear that discriminatory conduct which is otherwise private and nonaction-

able can run afoul of the Constitution if the government is, to some significant extent, involved. *Burton* v. *Wilmington Parking Authority* 365 U.S. 715 (1961) involved a privately owned restaurant which refused to serve blacks. The restaurant was, however, located in a building which was owned and operated by a State agency. The Supreme Court noted that the state agency had leased the space to the restaurant without requiring the insertion of a nondiscrimination provision in the lease and, accordingly, held the act of discrimination of the restaurant to be violative of the Fourteenth Amendment:

> The State has so far insinuated itself into a position of interdependence with Eagle [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the 14th amendment. [*Id.* at 725.]

The Supreme Court, in the *Burton* case, indicated that what the state agency should have done was to insert a nondiscrimination provision in the lease which it gave to the restaurant. What we are arguing essentially is that the FPC should be inserting a nondiscrimination provision in the license or certificate or permission which it gives to its regulatees.

In *Burton*, the governmental involvement which gave rise to the applicability of the constitutional nondiscrimination requirement was a lease of real property. In other cases such governmental involvement has been found in grants of funds [*Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1965); *United States* v. *Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970)] and grants of tax advantages [*Green* v. *Kennedy*, 309 F. Supp. 1127 (D. D.C. 1970) appeal dismissed 398 U.S. 956 (1970)]. Indeed *Burton* went so far as to indicate that a constitutional violation is established if ". . . to some significant extent the State in *any* of its manifestations has been found to have become involved in [the otherwise private discriminatory conduct]." [*Supra*, at 722]. [Emphasis

supplied]. Similarly, "state support of segregated schools *through any arrangement, management, funds or property* can not be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." [*Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958)] [Emphasis supplied].

It is then evident that many different types of governmental involvement in otherwise private conduct give rise to the constitutional requirement of nondiscrimination. We now reach the question as to whether governmental involvement in the form of federal regulation of private industry gives rise to such requirement.

In 1952, the Supreme Court ruled that a privately owned transit corporation and a privately owned communications corporation which were regulated by a federally created commission were subject to the due process requirements of the Fifth Amendment. [*Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952)].

> In finding this relation we do not rely on the mere fact that Capital Transit operates a public utility on the streets of the District of Columbia under authority of Congress. Nor do we rely upon the fact that, by reason of such Federal authorization, Capital Transit now enjoys a substantial monopoly of street railway and bus transportation in the District of Columbia. We do, however, recognize that Capital Transit operates its service under the rgulatory supervision of the Public Utilities Commission of the District of Columbia which is an agency authorized by Congress. We rely particularly upon the fact that that agency, pursuant to protests against the radio program, ordered an investigation of it and, after formal public hearings, ordered its investigation dismissed on the ground that the public safety, comfort, and convenience were not impaired thereby. [*Id.*, at 462].

The Public Utilities Commission in *Pollak* had no more extensive involvement with its regulated companies than do the federal regulatory agencies. Indeed the involve-

ment of the Federal Power Commission in the business of the electric and gas utility industry is immense:

> Under its statutory authority the Federal Power Commission (1) issues certificates authorizing natural gas pipelines to construct, extend, acquire or operate transportation and storage facilities for the transportation of natural gas in interstate commerce and for the sale of natural gas in interstate commerce for resale; (2) investigates the need for and, when appropriate, directs pipelines to sell natural gas to local distributors, investigates and regulates the rates, charges, and services for natural gas transported or sold for resale in interstate commerce; (3) authorizes abandonment of facilities or discontinuance of service subject to Commission jurisdiction; (4) promulgates and enforces a uniform system of accounting to assure that natural gas pipelines accurately report their financial position; (5) assures nondiscriminatory transportation and purchase of gas in submerged lands of the Outer Continental Shelf; (6) regulates the rates and services of public utilities selling electricity in interstate commerce at wholesale; (7) issues and administers permits and licenses for the planning, construction and operation of nonfederal hydroelectric projects on waters or lands subject to Federal jurisdiction; (8) promulgates and enforces a uniform system of accounting for interstate public utilities; (9) regulates certain issuance sales of securities by electric public utilities; (10) regulates the merger or consolidation of electric public utilities and their disposition or acquisition of electric facilities; (11) reviews and approves proposed rates for the sale of electric power from certain Federal and international hydroelectric projects; and (12) authorizes the exportation of electricity and natural gas to a foreign country and issues permits for maintaining facilities at international borders for their transmission. Under its rulemaking and regulatory powers, the Federal Power Commission has required the development of

> recreational facilities by its licensees, and provision for use of such facilities on a nondiscriminatory basis. The Commission has also insisted on regulatory safety inspections of facilities. Most other regulations detail the proper forms to use when submitting applications and other requests, or set forth the exact accounting procedures to be followed. [U.S. Commission on Civil Rights, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 1971; p. 368.]

The pervasive presence of the Federal Power Commission in the most vital economic matters which an electric or gas utility company must face—rates, construction of facilities, interstate sales of electricity or gas, financial accounting systems, mergers, consolidations and foreign transactions—satisfies any test of government involvement based on sufficiency of contacts, and, under the rationale of *Burton* and the other cases, raises a duty, on the part of the Federal Power Commission, to assure nondiscrimination in the business practices of its regulatees.

THE FEDERAL POWER COMMISSION HAS PROHIBITED ITS LICENSEES FROM DISCRIMINATING ON ACCOUNT OF RACE, COLOR, SEX, RELIGIOUS CREED AND NATIONAL ORIGIN IN PUBLIC ACCOMMODATIONS

The FPC has prohibited its licensed hydroelectric projects from discriminating on account of race, color, sex, religious creed and national origin in the field of public accommodations:

> The Commission expects the licensee to assume the following responsibilities:
>
> . . .
>
> (g) To ensure public access and recreational use of project lands and waters without regard to race, color, sex, religious creed or national origin.
>
> [18 CFR 2.7]

> Every licensee maintaining recreation facilities for the use of the public at a licensed project, or employing or permitting any other person to maintain such facilities, shall permit or require such other person to permit, equal and unobstructed use of such facilities to all members of the public without regard to race, color, religious creed or national origin.
>
> [18 CFR 8.3]

Since the FPC has assumed jurisdiction over the issue of racial, ethnic and sex discrimination in the area of public accommodations, it can hardly be heard to deny that it has such jurisdiction in the area of employment. Indeed, its rationale for the adoption of its public accommodation rule applies as well if not a fortiori to the area of employment:

> The courts have repeatedly held that a grant of the use of some part of the public domain to a private operator carries with it, as a matter of constitutional law, an obligation to operate the granted premises in a nondiscriminatory manner. This rule logically applies to the licensing by the Commission of non-Federal hydroelectric projects, and specifically to the recreation facilities provided at such projects. [31 F.R. 8376 (June 15, 1966)].

That such rule also logically applies to the employment practices of licensed hydroelectric projects or certified natural gas companies has been persuasively stated by the United States Commission on Civil Rights [U.S. Commission on Civil Rights, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT; 1971; p. 365-369].

The statutory authority cited by the FPC for the issuance of its public accommodation regulation is:

> . . . [S]ection 10(a) of the Federal Power Act, which gives the Commission responsibility for insuring the fullest practicable use of the Nation's waterway resources for recreational as well as electric energy and navigation purposes. It cannot seriously

be argued that a limitation of availability based on race, creed, color, or national origin is consistent with such use of project lands and waters for recreation. [32 F.R. 6487 (April 27, 1967)].

The FPC has assumed partial jurisdiction over the field of discrimination in access to public accommodations. There is no reason why it should not assume full jurisdiction over the field of discrimination in access to jobs as well. Further, the FPC has recognized and taken steps to carry out its responsibilities to assure and promote equal employment opportunity within its own personnel practices. [See Remarks of Rep. Wyman; Congressional Record, April 18, 1972, p. E3884].

OTHER FEDERAL REGULATORY AGENCIES HAVE EXERCISED JURISDICTION OVER EMPLOYMENT DISCRIMINATION

Two federal regulatory agencies have exercised jurisdiction over employment discrimination in the industries which they oversee: The Federal Communications Commission, on June 4, 1969, adopted rules requiring equal opportunity in the employment practices of broadcast licensees (34 F.R. 9284) and, on June 5, 1970, broadened those regulations to include an annual employment reporting requirement and a requirement for the preparation of equal opportunity programs to be furnished by regulatees in applications for permits, transfers of control and license renewals (35 F.R. 8825); and on April 27, 1972, the Federal Home Loan Bank Board published a nondiscrimination in employment regulation (37 F.R. 8436).

The FCC took several points into consideration in deciding to exercise jurisdiction over employment discrimination: (1) The FCC noted that it is charged with the responsibility of safeguarding the "public interest, convenience and necessity" in its licensing function, and that in discharging that responsibility, it has the duty of determining whether an applicant has violated the laws of the United States, including the Civil Rights Act. [13

FCC 2d 766, 768, 769]. (2) The FCC noted that there is a national policy against employment discrimination and that the industry which it regulates (broadcasting) is licensed under a public interest standard and must operate in the public interest, and drew the analogy between its observance of the national policy in its licensing function and the Federal government's observance of that policy in its contract award function. [13 FCC 2d 766, 769]. (3) Further, the FCC noted that a broadcast licensee is a public trustee charged with the responsibility of meeting the needs of the public it serves on an equitable basis and that if a licensee is practicing employment discrimination, a clear question is raised as to whether it is making a good faith effort to serve the entire public. [13 FCC 2d 766, 770].

It is clear that each of the above points taken into consideration by the FCC applies as well to the FPC and its regulation of the gas and electric utility industry. (1) The FPC is charged with the responsibility of safeguarding the "public interest" and the "public convenience and necessity" in its regulatory and licensing functions. [See e.g. Sections 201 and 203(a) and (b) of the Federal Power Act; sections 1(a) and 7(b) and (c) of the Natural Gas Act]. (2) Hydroelectric companies and natural gas companies are licensed or certified under a public interest standard and must operate in the public interest. [Section 4 of the Federal Power Act and section 7(c) of the Natural Gas Act]. (3) Electric and gas utility companies are public trustees charged with the responsibility of meeting the needs of the public they serve on an equitable basis. [Section 205(b) of the Federal Power Act and section 4(b) of the Natural Gas Act].

It would seem, then, that the conclusion that the FCC drew with respect to its authority and responsibility over employment discrimination in the broadcast industry would apply as well to the FPC and the electric and gas utility industry.

On December 4, 1969, the FCC extended the coverage of its nondiscrimination in employment regulation to

include telephone company and communications company common carriers, observing that "the same considerations of public policy are applicable to those communication common carriers subject to Commission jurisdiction." [34 F.R. 19200].

The Interstate Commerce Commission, while it has not yet issued a regulation prohibiting employment discrimination, has issued a presently pending notice of proposed rulemaking on the issue of equal opportunity in surface transportation [36 F.R. 10741 (June 2, 1971)].

Finally, the Civil Aeronautics Board has advised the Commission on Civil Rights that it is working on an advance notice of proposed rulemaking concerning the employment practices of its regulatees. [U.S. Commission on Civil Rights, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER; November, 1971; p. 178].

Respectfully submitted,

PETITIONERS

by _____

WILLIAM L. TAYLOR

by _____

RAYMOND B. MARCIN

Center for National Policy Review
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Washington, D.C. 20017

Their Attorneys

Before the

FEDERAL POWER COMMISSION

Docket No. ————

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

PROPOSED RULE

Section 1. *Definitions.* As used in this rule: (1) "Commission" means the Federal Power Commission; (2) "licensee" means any person, State or municipality licensed under the provisions of section 4 of the Federal Power Act, and any assignee or successor in interest thereof; (3) "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale; (4) "person" includes an individual or a corporation; (5) "public utility" means any person who owns or operates facilities subject to the jurisdiction of the Commission under Parts II or III of the Federal Power Act, and (6) "regulatee" means any licensee, natural gas company or public utility.

Sec. 2. *Policy.* The Commission finds and declares that: (1) Equal employment opportunity for all persons regardless of race, color, religion, sex or natural origin is a national policy; (2) the furtherance of that national policy is a matter of the public interest, and (3) it shall, in each determination under the Federal Power Act or the Natural Gas Act with respect to the public interest, give material consideration to such national policy.

Sec. 3. *Unlawful Employment Practices.* No regulatee shall (1) fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual

with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; (2) limit, segregate or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities of otherwise adversely affect his status as an employee, because of such individaul's race, color, religion, sex or national origin; (3) discriminate in admission to, or employment in, any program of apprenticeship, training or retraining, including on-the-job training, on account of an individual's race, color, religion, sex or national origin; (4) discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, State or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted or participated in any manner in an investigation, proceeding or hearing of such practice by any lawfully constituted authority, or (5) print or publish or cause to be printed or published any notice or advertisement relating to employment by such regulatee, indicating any preference, limitation, specification or discrimination based on race, color, religion, sex or national origin, except where a preference or specification is for the purpose of remedying past practices of discrimination.

Sec. 4. *Equal Employment Opportunity Programs. Duties of Management.* Each regulatee shall establish, maintain, carry out and file with the Commission a written equal employment opportunity program, in which the regulatee shall commit itself to each of the following courses of action: (1) Define the responsibility of each level of management to insure a positive application and vigorous enforcement of the policy of equal employment opportunity, and establish a procedure to review and control managerial and supervisory performance; (2) inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and secure their cooperation; (3) communicate the equal employment opportunity policy and program and its employment needs to sources of

qualified applicants without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis; (4) conduct a continuing campaign to exclude every form of prejudice or discrimination based on race, color, religion, sex or national origin from its personnel policies and practices and working conditions, and (5) conduct continuing reviews of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

Sec. 5. *Equal Employment Opportunity Programs. Substantive Content.* Each regulatee shall include in its equal employment opportunity program such specific practices as the following:

(1) To assure nondiscrimination in recruiting: (a) Posting notices in the regulatee's employment offices informing applicants of their equal employment rights and their right to notify the Federal Power Commission or other appropriate agency if they believe they have been the victim of discrimination; (b) Planning a notice in bold type on the employment application informing prospective employees that discrimination on account of race, color, religion, sex, or national origin is prohibited and they may notify the Federal Power Commission or other appropriate agency if they believe they have been discriminated against; (c) placing employment advertisements in media which have significant circulation among minority groups and females in the recruiting area; (d) recruiting through schools and colleges with significant minority group and female enrollments; (e) maintaining systematic contacts with minority, human relations and female organizations, leaders and spokesmen to encourage referral of qualified minority and female applicants; (f) encouraging present employees to refer minority and female applicants, and (g) making known to all recruitment sources that qualified minority and female persons are being sought whenever the company hires.

(2) To assure nondiscrimination in selection and hiring: (a) Instructing those of the regulatee's staff who make hiring decisions that all applicants for all jobs are to be considered without discrimination; (b) cooperating with unions in the development of programs to assure qualified minority and female personnel equal opportunity for employment and including an effective nondiscrimination clause in new or renegotiated union agreements, and (c) avoiding the use of selection techniques or tests which have the effect of discrimination against minority groups or females.

(3) To assure nondiscrimination in placement and promotion: (a) Instructing those of the regulatee's staff who make decisions on placement and promotions that minority and female employees are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination; (b) giving all employees equal opportunity for positions which lead to higher positions, and inquiring as to the interests and skills of all lower paid employees with respect to any of the higher paid positions, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such positions, and (c) reviewing seniority practices and seniority clauses in union contracts to insure that such practices or clauses are not discriminatory and do not have a discriminatory effect.

(4) To assure nondiscrimination in other areas of employment practices: (a) Examining rates of pay and fringe benefits for present employees with equivalent duties, and adjusting any inequities found, and (b) advising all qualified employees whenever there is an opportunity to perform overtime work.

Sec. 6. *Annual Employment Reports.* Each regulatee shall, contemporaneously with the filing of its EEO-1 form with the United States Equal Employment Opportunity Commission, file a copy thereof with the Commission.

Sec. 7. *Applicants to furnish equal employment information.* Each applicant for a license, renewal thereof, certificate of public convenience and necessity, rate change, permission to abandon a facility, permission to sell, lease or dispose of a facility, permission to merge facilities or any other permission or authorization in which the Commission is charged by law with protecting the public interest, shall include with its application (1) a report indicating the manner in which the specific practices undertaken pursuant to the regulatee's equal employment opportunity program have been applied and the effect of these practices upon the applications for employment, hiring and promotions of minority group members and females; (2) a report indicating whether any complaint has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the applicant, including the persons involved, the date of filing, the court or agency before which the matter is or has been, the file number (if any), and the disposition or current status of the matter, and (3) a copy of the regulatee's last current EEO-1 form.

Sec. 8. *Affirmative Action Plans satisfactory.* In the case of any regulatee which is required to file an affirmative action plan with the Office of Federal Contract Compliance of the United States Department of Labor or any other Federal agency, a copy of such plan may be filed in lieu of the program required under the provisions of sections 4 and 5 of this rule.

Sec. 9. *Complaints of discrimination.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, by himself or by a representative, file a complaint with the Commission. The provisions of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations with respect to the processing of complaints, the conduct of hearings and the issuance of decisions and orders shall apply to complaints filed under this section.

Sec. 10. *Intervention.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, in accordance with the provisions of section 1.8 of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations, participate in any proceeding involving applications for such authorizations or permissions as the Commission may give under statutory or other delegated authority administered by it.

Sec. 11. *Consideration of equal employment information in making public interest determinations and sanctions.* In each proceeding in which the Commission is charged by law with protecting the public interest, including but not limited to applications for licenses, certificates of public convenience or necessity, rate changes, permission to abandon facilities, permissions to sell, lease or dispose of facilities and permissions to merge facilities, the Commission shall give material consideration to the information required to be provided under the provisions of sections 4, 5, 6 and 7 of this rule, and may deny, delay or condition any such license, certificate, rate change, or permission in accordance with such consideration.

Sec. 12. *Referrals and Deferrals to EEOC.* The Commission may refer any complaint involving a probable violation of any provision of Title VII of the Civil Rights Act of 1964, as amended, to the Equal Employment Opportunity Commission. If duplicate complaints are filed both with the Commission and with the Equal Opportunity Commission, the Commission shall defer jurisdiction and the Equal Employment Opportunity Commission will process the complaint.

Sec. 13. *Proceedings in forma pauperis.* The Commission shall, upon the filing of an affidavit of indigency by any complainant or intervener, provide reasonable counsel fees and copies of transcripts of hearings without charge.

Sec. 14. *Penalties.* The penalties prescribed for violations of the regulations or orders of the Commission under the provisions of section 21 of the Natural Gas Act and section 316 of the Federal Power Act shall

apply to violations of this rule or of orders of the Commission issued pursuant thereto.

Sec. 15. *Court Review of Orders.* Any party aggrieved by an order of the Commission issued pursuant to this rule may apply for rehearing and court review of such order in accordance with the provisions of section 19 of the Natural Gas Act of section 313 of the Federal Power Act.

Respectfully submitted,

PETITIONERS

by _____
WILLIAM L. TAYLOR

by _____
RAYMOND B. MARCIN

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Their Attorneys

Before the

FEDERAL POWER COMMISSION

Docket No. ———

EQUAL EMPLOYMENT OPPORTUNITY OF THE ELECTRIC AND GAS UTILITY INDUSTRY

PETITIONERS' STATEMENT OF INTEREST

The NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP) was formed in 1909 and incorporated under New York law as a nonprofit membership corporation in 1911. It maintains its headquarters in New York and presently has some eighteen hundred active unincorporated branches and approximately 450,000 members throughout the Nation. The basic aims and purposes of the NAACP are to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizen rights in the United States. To this end its activities have included advocating for civil rights legislation at local, State, and Federal levels. Its executive director is Roy Wilkins and its national headquarters is at 1790 Broadway in New York City.

The NATIONAL URBAN LEAGUE is a professional community service organization committed to securing equal opportunities for Negroes and other minorities in all areas of American life. It has 94 affiliates and five regional offices throughout the Nation. The executive director of the National Urban League is Vernon Jordan and its headquarters are at 55 East 52nd Street in New York City.

The MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND represents the interests

of Mexican American citizens in cases dealing with discrimination in employment as well as other areas of human activity. It has worked to expand judicial opinions which have dealt with discrimination against Negroes to situations involving denials of rights because of national origin or ethnic background. Its general counsel is Mario Obledo and its National office is at 145 Ninth Street in San Francisco.

The NATIONAL ORGANIZATION FOR WOMEN (NOW) is a civil rights organization founded in 1966 to bring women into full participation in American society. NOW's activities have included advocating for a greater recognition by federal agencies of civil rights responsibilities, including equal employment responsibilities. NOW has more than two hundred chapters and fifteen thousand members throughout the Nation. Its president is Wilma Scott Heide and its National Office is at 1957 East 73rd Street in Chicago.

The WOMEN'S EQUITY ACTION LEAGUE is a civil rights organization for women which seeks to promote greater economic progress on the part of American women, to press for full enforcement of existing antidiscrimination laws in behalf of women, to correct de facto discrimination against women, to investigate instances of and to find solutions to economic, educational, tax, and employment problems affecting women, and to effect a reappraisal of federal, state, and local laws and practices limiting women's employment opportunities. Its president is Arvonne Frazer and its offices are at 1253 4th Street, S.W., in Washington, D.C.

The LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LUNAC) is a Mexican American organization with chapters throughout the southwestern United States, including 55 in California. Among its aims and goals is the assurance of equal employment opportunities for Mexican American citizens. The President of LUNAC is Fidel Gonzales and its headquarters are at 7149 South Tico Vista Road in Tico Rivera, California.

The ASSOCIATION FOR THE BETTERMENT OF BLACK EDISON EMPLOYEES was organized in the late 1960's by black employees at the Detroit Edison Company. The Association has sought to end racially discriminatory hiring and upgrading practices through meetings with company officials, through the filing of complaints with the Michigan Civil Rights Commission and the United States Equal Employment Opportunity Commission and through litigation in federal court. The offices of the Association are at 19300 Sunset in Detroit, Michigan.

The OFFICE OF COMMUNICATIONS is an instrumentality of the UNITED CHURCH OF CHRIST and conducts a ministry in mass communications. The goals and priorities of the United Church of Christ include the attainment of interracial justice and the elimination of discrimination on account of race and sex. The United Church of Christ has more than two million members throughout the Nation, and its Office of Communications is at 289 Park Avenue South in New York City.

The CENTER FOR COMMUNITY CHANGE is an organization which provides assistance and support to minority and poor community development groups across the country who are attempting to improve their economic conditions. Such groups represent a cross-section of black and Spanish surnamed, urban and rural Americans. The offices of the Center for Community Change are at 1000 Wisconsin Avenue, N.W., in Washington, D.C.

The AMERICAN G.I. FORUM, a California Corporation, was founded in Corpus Christi, Texas, in 1948 to aid Mexican American veterans of World War II in obtaining their G.I. benefits. Since then, the organization has expanded into broader community and civil rights concerns. The American G.I. Forum now has many chapters throughout the southwest including 41 in California alone. Its aims and goals now include the assurance of equal employment opportunities for Mexican American citizens. The President of its California chapter is Frank Galaz and its California headquarters is at 10512 Seventh Avenue in Engelwood.

The MEXICAN AMERICAN POLITICAL ASSOCIATION (MAPA) is a Mexican American organization with chapters throughout the southwestern United States including 50 in California. Among its aims and goals is the assurance of equal employment opportunities for Mexican American citizens. The President of MAPA is Armando Rodriquez and its headquarters are at 3340 East Kerckhoff in Fresno, California.

UNITED NATIVE AMERICANS, INC., is an American Indian organization based in California. Its purposes included securing the civil rights of native American citizens through education, economic development activities and social action. The President of United Native Americans, Inc., is Lee Brightman and its address is P.O. Box 26149 in San Francisco.

Before the

FEDERAL POWER COMMISSION

Docket No. ———

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

VERIFICATION OF PETITION

District of Columbia)
) ss.
City of Washington)

June —, 1972

William L. Taylor, an attorney duly licensed to practice law in the District of Columbia and representing the petitioners herein, being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof to be true, except as to matters and things, if any, stated on information and belief, and that, as to those matters and things, he believes them to be true.

WILLIAM L. TAYLOR

Subscribed and sworn to before me this —— day of June, 1972, in the city of Washington, D.C.

Notary Public

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

EMPLOYMENT PRACTICES

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker, and Rush Moody, Jr.

Docket No. R-447

The National Association for the Advancement of Colored People
The National Urban League
The Mexican American Legal Defense and Educational Fund
The National Organization for Women
The Women's Equity Action League
The League of United Latin American Citizens (in California)
The Association for the Betterment of Black Edison Employees
The Office of Communications of the United Church of Christ
The Center for Community Change
The American G.I. Forum (in California)
The Mexican American Political Association
United Native Americans, Inc.

OPINION NO. 623

DECLARATORY OPINION AND ORDER ON PETITION FOR ISSUANCE OF A RULE RELATIVE TO EMPLOYMENT PRACTICES

(Issued July 11, 1972)

The petition to which this Opinion is addressed was filed June 22, 1972, and is treated herein as a petition for a declaratory order. See 1.7(c) Federal Power Commission Rules of Practice and Procedure, 18 CFR 1.7(c).

Petitioners raise important issues of policy and law which should be considered through judicial interpretation of regulatory statutes and laws and regulations governing employment practices and equal opportunities. This subject matter has been considered previously by the Commission as it affects statutory provisions which the Federal Power Commission administers. Those Commission determinations have not been challenged on appeal, even though one or more petitioners herein were parties.

Three docketed cases[1] have arisen under the Federal Power Act, 16 U.S.C. 791(a) *et seq.*, in which a number of the underlying legal issues raised in the subject petition were considered. They were resolved by the Commission in a manner consistent with the views set forth in this Opinion and Order. They were presented in arguments raised by certain of the petitioners now before the Commission.

The Commission lacks the legal authority to promulgate equal employment opportunity regulations covering employment practices of those systems which it regulates as natural gas companies, public utilities or licensees, because it lacks the requisite delegation of Congressional

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[1] *Pacific Gas and Electric Company*, 44 FPC 1365, 1373 (1970), appeals dropped, unreported orders of the Court of Appeals for the Ninth Circuit filed April 26, 1971, and June 22, 1971, *Pacific Gas and Electric Company* v. *Federal Power Commission*, Nos. 71-1027, 71-1028, 71-1453 and 71-1454; and *Virginia Electric and Power Company*, —— FPC ——, order issued August 5, 1971, not appealed.

authority to act in that area. Executive authority and constitutional considerations do not provide the basis for Commission jurisdiction. Simply stated, the Commission is not the designated agency for the administration of equal employment laws or any other type of labor regulation. As pointed out *infra*, regulation of this type is the province of a specific number of departments and agencies of the Federal Government, and state agencies.

Where the Commission does have specific responsibilities in the area of equal rights, they are being enforced. These are: (1) as an employer and agency of the Federal Government subject to the requirements of Executive Order No. 11478, August 8, 1969, 34 F.R. 12985; and (2) as the Congressionally delegated agency charged by the Congress with the duty to administer the comprehensive use of resources standard governing hydroelectric licensing under the Federal Power Act, 16 U.S.C. 803(a), i.e., in a manner to insure that multipurpose hydroelectric facilities (e.g., power production, navigation, recreation and other uses), are open to use by all persons upon non-discriminatory bases. Implementing regulations of the Commission are set forth in Federal Power Commission Administrative Order No. 131, Equal Employment Opportunity, issued January 26, 1970, *Administrative Manual*; and Federal Power Commission Order No. 341 Amending Regulations Under the Federal Power Act, Prohibition of Discrimination at Recreational Facilities at Licensed Hydroelectric Projects, issued April 19, 1967, 37 FPC 775 [2].

The Commission is mindful and fully supportive of the National policies of this Nation directed at the elimination of discriminatory treatment of persons based upon race, creed, color, religion, sex or national origin. The Commission welcomes judicial review and final resolution of the findings and conclusions set forth in this Opinion.

Requested Relief—Petitioners seek a general rulemaking action of the Commission directed to the promulga-

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[2] Codified Part 8 Commission Regulations under the Federal Power Act, 18 CFR Part 8.

tion of "* * * regulations prohibiting discrimination on account of race, color, religion, sex and national origin and assuring equal opportunity in the employment practices of its regulatees * * *." Petition, p. 3. Procedurally, petitioners seek public hearings before the Commission, oral argument and a general public rulemaking through notice of a rule[3] and written responses thereto. We deny that request because of the basic conclusions which the Commission has reached relative to the scope of its regulatory authority. As the Commission stated in *Pacific Gas and Electric, supra,* 44 FPC 1368:

> The legal issues, which must be of concern to us in this proceeding, are those over which we have jurisdiction. We do not find the issues raised * * * sufficiently related to a legitimate regulatory purpose as expressed in the Federal Power Act that we can proceed as requested * * * we do not find it appropriate in the exercise of our general administrative power to order a hearing on ultimate issues which we could not lawfully resolve.

The bases of the Commission's jurisdiction to act in respect to natural gas companies, public utilities and licensees, are statutory: namely, the Federal Power Act, 16 U.S.C. 791(a) *et seq.*, passed in 1920 as the Federal Water Power Act, 41 Stat. 1063, and substantially amended in 1935, 49 Stat. 838; and the Natural Gas Act, 15 U.S.C. 717 *et seq.*, passed in 1938. Other statutes cited by petitioners in support of their claims do not grant jurisdictional authority to this Commission. In our judgment, the Congress has not granted authority under any of these statutes for this agency to act as a remedial forum for the redress of unlawful employment practices.

Discussion of Authorities—Petitioners legal arguments are directed to various sections of the Natural Gas Act, the Federal Power Act, the Civil Rights Act of 1964, as amended, 78 Stat. 241, 42 U.S.C. 1971 *et seq.*, the

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[3] A proposed rule annexed to the petition is reproduced in Appendix A hereto.

Civil Rights Act of 1866, 14 Stat. 27, the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), Executive Order Nos. 11246 and 11375, the Fifth Amendment to the United States Constitution and the Fair Employment Practices Acts of various states. We consider these *seriatim.*

Referring to the Natural Gas Act and natural gas companies, petitioners cite sections dealing with the Congressional grant of jurisdiction to the Commission to regulate interstate transportation and sale of natural gas for resale in interstate commerce in the public interest, 15 U.S.C. 717(a); the certification of such transactions and facilities therefor of natural gas companies and abandonment thereof as required by the public convenience and necessity, 15 U.S.C. 717f(b)(c); the control of the types of wholesale gas services of natural gas companies and rates therefor as required under a standard of just, reasonable, without undue discrimination or preference, 15 U.S.C. 717c(b), d; and general administrative procedural authority of the Commission, 15 U.S.C. 717o.

Referring to the Federal Power Act and public utilities and licensees, petitioners cite sections dealing with the Congressional grant of jurisdiction to regulate interstate transmission and sale of electric energy for resale in interstate commerce in the public interest, 16 U.S.C. 824(a); the control of the merger, sale or disposition of jurisdictional properties of public utilities or acquisition of the capital securities thereof as required in the public interest, 16 U.S.C. 824b(a)(b); the control of the types of wholesale or bulk power services of public utilities and rates therefor as required under a standard of just, reasonable, without undue discrimination or preference, 16 U.S.C. 824d(b), e; the licensing of hydroelectric project works of licensees upon streams over which the Congress has jurisdiction, upon public lands and reservations of the United States and at federally owned dams, 16 U.S.C. 797(e); and the general administrative procedural authority of the Commission, 16 U.S.C. 825h.

Essentially, petitioners argue that public interest considerations enfold the national policies against discrimi-

nation in employment and therefore make their implementation and execution a part of this Commission's regulatory jurisdiction and authority. We can not accept this generalized argument. Application of the public interest concept in the context of any given regulatory statute presupposes inquiry into, and observance of, the legislative purposes of that Act. As pointed out *infra*, the purposes of the Natural Gas and Federal Power Acts are economic regulation of entrepreneurs engaged in resource developments. So considered, we do not find the necessary nexus between those aspects of our economic regulatory activities and the employment procedures of the utility systems which we regulate, as would justify the ultimate conclusion petitioners draw. We distinguish employment procedures from other subjects such as national defense considerations, antitrust, environmental requirements, navigation, flood control or recreation, all of which are reflected in the Natural Gas and Federal Power Acts. See for example, 15 U.S.C. 717j, 717s(a); and 16 U.S.C. 803(a)(h), 804, 805, 809, 824a(a) and 825j.

Nothing in either of the basic statutes which we administer—the Federal Power Act and the Natural Gas Act—and particularly the sections referenced by petitioners, addresses the matter of employment procedures of natural gas companies, public utilities or licensees, nor does the legislative history of either Act give any basis for believing that Congress intended to confer jurisdiction upon the Commission to regulate those activities. Both statutes are economic regulatory devices born out of economic development and financial conditions which prevailed nationally earlier in this century. The Federal Water Power Act (Part I of the Federal Power Act), is, as its preamble states, "* * * An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of public lands in relation thereto * * * and for other purposes.", 41 Stat. 1063. The Federal Power Act is Title II of the Public Utility Act of 1935, 49 Stat. 838, "An Act To provide for control and regulation of public utility holding companies, and for other

purposes.", 49 Stat. 803. The Natural Gas Act, as its preamble states, is "An Act To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.", 52 Stat. 821.

Constitutional considerations and the inability of individual states to regulate and control multi-state utility operations, i.e., interstate transmissions and wholesale transactions involving electric energy and natural gas were principal factors in the enactment of the Federal Power and Natural Gas Acts. *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927); *Federal Power Commission, et al.* v. *Natural Gas Pipeline Co., et al.*, 315 U.S. 575, 581-83 (1942); *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 525-531 (1945); and *Federal Power Commission* v. *Southern California Edison Company, et al.*, 376 U.S. 205, 213-14 (1964). In short, Congress, through the enactment of these statutes, provided Federal regulation of electric and natural gas services and transactions which are beyond the reach of state public service commission control. See for example, House Report No. 61, on H.R. 3184 (which became the Federal Water Power Act), 66th Cong., 1st Sess., p. 5; Senate Report No. 621, on S. 2796 (which became the Federal Power Act), 74th Cong., 1st Sess., pp. 3, 17-18, 22; and House Report No. 709 on H.R. 6586 (which became the Natural Gas Act), 75th Cong., 1st Sess., pp. 1-3.

The consumer and services and prices for electric and gas utility services were focal points of Congressional concern in the enactment of both statutes. See *Pennsylvania Water & Power Co. et al.* v. *Federal Power Commission et al.*, 343 U.S. 414, 418 (1952) "A major purpose of the whole Act is to protect power consumers against excessive prices * * *."; *Atlantic Refining Co., et al.* v. *Public Service Company of New York, et al.*, 360 U.S. 378, 388 (1959), "the [Natural Gas] Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."; and *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp., et al.*, 365 U.S. 1, 19

(1961) "When Congress enacted the Natural Gas Act, it was motivated by a desire 'to protect consumers against exploitation at the hands of natural gas companies'."

It is in the context of these considerations that we reject petitioners' broad public interest arguments. The public interest concept does not provide the basis for this Commission to regulate employment procedures of natural gas companies, public utilities or licensees; any more than the public interest would have us regulate the securities, taxes, the patents, the safety, the wages and hours, the advertising or any other of a number of areas which Congress has created specialized agencies to regulate, including equal employment opportunities. The Natural Gas and Federal Power Acts do not admit of such interpretation.

Congress has acted in the area of labor law and equal employment opportunity protection. See, for example, 29 U.S.C. Chapters 1-15, and in particular, Chapter 2. Women's Bureau, Chapter 4B. Federal Employment Service, Chapter 5. Labor Disputes, Mediation and Injunctive Relief, Chapter 6. Jurisdiction of Courts in Matters Affecting Employer and Employee, Chapter 7. Labor-Management Relations, Chapter 8. Fair Labor Standards, Chapter 9. Portal to Portal Pay, Chapter 11. Labor-Management Reporting and Disclosure Procedure, Chapter 12. Department of Labor, Chapter 14. Age Discrimination in Employment, and Chapter 15, Occupational Safety and Health; the Civil Rights Act of 1964, 78 Stat. 241; the Equal Pay Act of 1963, 77 Stat. 56; and the Equal Employment Opportunity Act of 1972, 86 Stat. 103.[4] In no instance did the Congress

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[4] *Cf.* the Civil Rights Acts of 1866, 14 Stat. 27, and 1870, 16 Stat. 140, 42 U.S.C. 1981-1982, Equal rights under the law, Property rights of citizens.

§ 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and

specify administrative duties for this Commission in these areas.

The basic statute of concern in light of petitioners' arguments, is the Civil Rights Acts of 1964, as amended, including the Equal Employment Opportunity Act of 1972. As pointed out in the Opinion of the Supreme Court, *Griggs, et al.* v. *Duke Power Company*, 401 U.S. 424, 429-31 (1971), "The objective of Congress in the enactment of Title VII [Civil Rights Act of 1964] * * * was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees * * * what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate insidiously to discriminate on the basis of racial or other impermissible classification." Title VII of that Act, 78 Stat. 253, 42 U.S.C. 2000e, establishes the Equal Employment Opportunity Commission to administer those provisions. That Act specifies the actions which constitute unlawful employment practices, 42 U.S.C. 2000e-2, -3 [5]. Investigatory authority is conferred upon the EEOC, including examination of witnesses and production of evidence with provision for judicial enforcement of investigatory determinations, 42 U.S.C. 2000e-5, -8, -9. The EEOC may prescribe procedural regulations pursuant to the require-

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shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of exery kind, and to no other.

§ 1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

[5] Among the proscribed conduct are "* * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * * or * * * to limit, segregate, or clarify * * * to deprive any individual of employment opportunities or otherwise adversly affect * * * status as an employee, because of such individual's race, color, religion, sex, or national origin", 42 U.S.C. 2000e-2(a)(1)(2).

ment of the Administrative Procedure Act, 42 U.S.C. 2000e-12. It may direct the keeping of records relevant to employment practices and enforcement of the Civil Rights Act, subject to the statutory provision that information so obtained by the EEOC shall not be made public by it prior to the initiation of any proceeding involving such information, 42 U.S.C. 2000e-8. Its investigation of claimed violations of Title VII, by statute, are not public without the written consent of the parties and may not be used as evidence in any subsequent proceeding, 42 U.S.C. 2000e-5(a). The Act provides for mediation and conciliation measures leading to voluntary compliance measures by the EEOC, 42 U.S.C. 2000e-5 (a). Private persons aggrieved have recourse to the courts with injunctive and equitable remedies, together with court appointed counsel, 42 U.S.C. 2000e-5(e). The Act also provides for civil enforcement actions by the Attorney General, 42 U.S.C. 2000e-6, -5()e).

Pursuant to the 1972 amendments, the coverage of Title VII provisions are extended to certain state and local government authorities and private employers with 15 or more persons and private and public educational institutions, 86 Stat. 103, 42 U.S.C. 2000e.

The power of the EEOC is extended "* * * to prevent any person from engaging in any [equal opportunity] unlawful employment practices * * *", 86 Stat. 104, 42 U.S.C. 2000e-5. The EEOC is required to serve notice of charges, which, by statute, are not to be made public by the Commission; to investigate the same, according "* * * substantial weight to final findings and orders made by state or local authorities in proceedings commenced under State or local law * * *"; and to endeavor to mediate or conciliate controversies which have reasonable cause, or otherwise to dismiss the charge. The EEOC is to defer, initially, to state or local agencies having jurisdiction in the premises under an exhaustion of remedies principle. Where the EEOC is unable to mediate or conciliate, it may bring a civil action in the Federal courts in pursuit of equitable remedies or affirmative relief. Where the respondent party is a governmental authority, the Act provides for initiation of

such court actions by the Attorney General. The EEOC and the Attorney General are also authorized to seek temporary judicial relief. The party aggrieved may also initiate court action under certain conditions, may seek court appointed counsel and may intervene in actions initiated by the EEOC or the Attorney General. The Equal Employment Opportunity Act of 1972 provides for transfer of these functions of the Attorney General to the EEOC effective in 1974.

The 1972 amendments confer upon the EEOC, in connection with its hearings and investigations, the powers of National Labor Relations Act, 29 U.S.C. 161, 86 Stat. 109, 42 U.S.C. 2000e-9. The type of investigatory rulemaking which petitioners seek before this Commission is within the authority of the EEOC to effectuate. Indeed, that agency's established reporting requirements appear to comprehend essentially the type of information which petitioners seek to assemble through this agency. The amendments provide for a Presidentially appointed general counsel of the EEOC with the * * * responsibility for the conduct of litigation as provided in Sections 706 and 707 [42 U.S.C. 2000e-5, -6] of this title.", 86 Stat. 110, 42 U.S.C. 2000e-4. In the enactment of the 1972 revisions to the Civil Rights Act of 1964, the Congress considered and rejected a provision whereby recognized remedies for enforcement of equal rights and labor practices, would be pre-empted. See, United States Code Congressional and Administrative News, 92nd Cong., 2nd Sess., No. 3, pp. 1049-50, 1022, 1043-44. Congress clearly evidenced its intention regarding the enforcement of equal rights, including its intention in respect to administrative actions dealing with equal employment opportunities. The Civil Rights Act, as amended, does not specify that all departments and agencies are to undertake the administration or implementation thereof. When the Congress wishes to accomplish that result, it so states. See, National Environmental Policy Act of 1969, 42 U.S.C. 4321, 4332, 4333.

The 1972 amendments establish an Equal Employment Opportunity Coordinating Council with "* * * responsi-

bility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. * * *", 86 Stat. 111. The Council is comprised of the Attorney General, Secretary of Labor, and the Chairmen of the EEOC, the United States Civil Service Commission and the United States Civil Rights Commission.

The Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), cited by petitioners, is a part of the Fair Labor Standards Act of 1938, enforced by the Wage and Hour and Public Contracts Divisions of the Labor Department, not the Federal Power Commission. That Act's provisions are directed to wage differentials based upon sex. As such, the coverage, of this Act is more restrictive than the Civil Rights Act's prohibition of discrimination based upon sex, the latter extending to areas other than wage discrimination. Criminal and civil actions may ensue in enforcement of the Fair Labor Standards Act.

Executive Order No. 11246, September 24, 1965, 30 F.R. 12319, as amended by Executive Order No. 11375, October 13, 1967, 32 F.R. 14303, implements the "* * * program of equal employment opportunity in Government employment, employment by Federal contractors and sub-contractors and employment under federally assisted construction contracts * * *", regardless of sex, race, creed, color, or national origin, 3 CFR 685. As recognized in these orders, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, enunciates the national policy of equal opportunity in private employment, and Title VI, 78 Stat. 252, is specifically directed to non-discrimination in federally financially assisted programs. The Secretary of Labor is the designated administering officer of Parts II and III of Executive Order No. 11246, which relate to Government contractors, sub-contractors, and federally assisted programs. Executive Order No. 11247, September 24, 1965, 30 F.R. 12327, assigns coordinating

function responsibilities to the Attorney General in respect to Title VI matters. The Secretary of Labor, by Order No. 15-68, August 8, 1968, 33 F.R. 12600, assigned the responsibility under Executive Order No. 11246, to the Office of Federal Contract Compliance.[6]

Order No. 1, issued October 24, 1969, by the Office of Federal Contract Compliance re-delegates certain of its responsibilities to 16 departments or agencies, each with designated compliance responsibility relative to equal employment opportunity[7]. Order No. 1 states in part: "2. Action.—a. The agencies listed herein below are designated as compliance agencies. Other agencies, not so listed, are hereby relieved of any compliance responsibilities under the Executive Order [11246].", Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 4380. The Office of Federal Contract Compliance

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[6] Order No. 15-68 states in part (33 F.R. 12600-1):

> Under the general direction of the Secretary * * * the Office of Federal Contract Compliance (EEO) is hereby delegated authority and assigned responsibility for: * * * Carrying out * * * Parts II, III, IV of Executive Order No. 11246 as amended by Executive Order No. 11375 * * * Developing and recommending to the Secretary rules and regulations necessary or appropriate to achieve the purposes of * * * 11246 * * * 11375 * * * Coordinating with the Equal Employment Opportunity Commission and the Department of Justice on matters relating to Title VII * * * and maintaining liaison with other agencies having civil rights and equal employment opportunity activities * * *.

[7] The departments and agencies are: Agency For International Development, Department of Agriculture, United States Atomic Energy Commission, Department of Commerce, Department of Defense, General Services Administration (whose industries include electric, gas and sanitary services, holding and investment companies), Department of Health, Education and Welfare, Department of Housing and Urban Development, Department of the Interior (whose industries include mining and oil, petroleum, refining and related industries and pipeline transportation), National Aeronautical and Space Administration, Post Office Department, Department of Transportation, Tennessee Valley Authority, Department of the Treasury, Veterans Administration and the Environmental Protection Agency.

and the Equal Employment Opportunity Commission, on May 20, 1970, 35 F.R. 8461, entered into a Memorandum of Understanding "* * * to reduce duplication of compliance activities and to facilitate information exchange * * *."

The Office of Federal Contract Compliance Implementing Rules and Regulations under Executive Order 11246, are set forth in Title 41, Code of Federal Regulations, Chapter 60, Part 60-1, Obligations of contractors and sub-contractors, Part 60-2. Affirmative action programs, Part 60-3, Employee testing and other selection procedures, Part 60-5, Washington plan, Part 60-6, San Francisco Plan, Part 60-7, St. Louis plan, Part 60-8, Atlanta plan, and Part 60-20, Sex discrimination guidelines[8]. The Implementing Rules and Regulations of the Equal Employment Opportunity Commission are set forth in Title 29, Code of Federal Regulations, Chapter XIV, Part 1600, Employee responsibility and conduct, Part 1601, Procedural regulations, Part 1602, Records and Reports, Part 1604, Guidelines on Discrimination because of sex, Part 1605, Guidelines on Discrimination because of religion, Part 1606, Guidelines on Discrimination because of national origin, Part 1607, Guidelines on Employee selection procedures, and Part 1610, Availability of Records[9]

The foregoing matters we believe, effectively demonstrate why this Commission does not have the responsibility pursuant to Executive Order Nos. 11246 and 11375, as alleged by petitioners.

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[8] Office of Federal Contract Compliance Order No. 14, issued January 14, 1972, sets forth proposed new procedures to standardize compliance reviews of employment in Federal contract areas. Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 4345.

[9] See also, Regulations of the Department of the Interior and of the General Services Administration, pursuant to their assigned responsibilities under Title VI of the Civil Rights Act of 1964 (Interior), 43 CFR Parts 17 and 17a, and (GSA), 41 CFR Subpart 101-6.2. Accommodations between Federal Labor and Civil Rights Laws are discussed in Labor Law Reports, Employment Practices, CCH, Vol. I, paragraph 5063.

Petitioners also cite the Fifth Amendment to the Constitution in support of their claims. We find nothing in the Constitution or the judicial interpretations thereof, as would support Commission regulation of utility employment practices. That which the Constitution does require, this Commission is now doing. No governmental action which this agency takes denies any person of equal protection of the laws. See *Moose Lodge No. 107* v. *Irvis, et al.*, —— U.S. ——, decided June 12, 1972, Slip Op. pp. 8-9, which discusses constitutional protections in the context of the Fourteenth Amendment:

> In 1883, this Court in *The Civil Rights Cases*, 109 U.S. 3, set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, "however discriminatory or wrongful," against which that clause "erects no shield," *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). That dichotomy has been subsequently reaffirmed in *Shelley* v. *Kraemer*, *supra*, and in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1951).
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> While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "State action," on the other hand, frequently admits of no easy answer. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." *Burton* v *Wilmington Parking Authority*, *supra*, at 772.
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> Our cases make clear that the impetus for the forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination. *Shelley* v. *Kraemer*, *supra*.

This Commission, as pointed out in *Pacific Gas and Electric*, *supra*, 44 FPC 1367-8, does not countenance discriminatory treatment in respect to the rendition of utility services which it regulates, based upon race, sex, color, creed or national origin; does not permit its

hydroelectric licensees owning or operating multiple purpose reservoirs to discriminate in the use thereof, based upon race, sex, color, creed or national origin; and has affirmatively spoken out in respect to the need for all utility suppliers to fully implement the Nation's policy respecting elimination of discrimination in employment. Thus, where this agency takes "State action" within the meaning of Constitutional considerations, its processes do not deny equal protection of the laws either by reason of any Commission rule, regulation or order or by reason of enforcement of a private discriminatory action.

Petitioners' references to actions of the Federal Communications Commission and the Public Service Commission of the District of Columbia, are not persuasive in the interpretation of the provisions of Federal Power and Natural Gas Acts. Both are legally distinguishable. The Federal Communications Commission, the one Federal administrative utility regulatory body which has promulgated regulations in the area of equal employment practices of its regulatees of the general type petitioners seek, did so following judicial interpretation of one of the basic statutes which it administers, the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, *Office of Communications of the United Church of Christ, et al.* v. *F.C.C., et al.*, 359 F.2d 994, 1003, 1006 (CADC, 1966)[10]. The Court recognized two basic concepts of that Act with a nexus to employment practices, the "fairness

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[10] As petitioners note, the Interstate Commerce Commission initiated a rulemaking inquiry on May 6, 1971, to consider whether there is discrimination in carriers' employment practices, whether laws are being violated, whether that Commission has jurisdiction to deal with the matter, and what action the Commission should take if it has jurisdiction, Notice of Proposed Rulemaking, Ex-Parte No. 278, 36 F.R. 10741. The Securities and Exchange Commission, by Release Nos. 5170 and 9252, July 19, 1971, called attention to disclosure requirements in SEC forms as to civil rights legal actions affecting the security registrant's business activities, such as loss of government contracts or civil rights enforcement activities. The Federal Home Loan Bank Board Regulation referred to by petitioners, April 21, 1972, 37 F.R. 8436, is an exercise of responsibility which that agency has by reason of *inter alia*, Title VIII, Fair Housing, Public Law 90-284, 82 Stat. 73, 81.

doctrine" and the "public reaction to programming test" [11], neither of which are reflected in the Natural Gas or Federal Power Acts. The Communications Commission, by orders released March 29, 1972, 37 F.R. 6586, February 12, 1971, 36 F.R. 3119, August 11, 1970, 35 F.R. 12892, and June 3, 1970, 35 F.R. 8825, adopted reporting regulations requiring cable television operators, communications common carriers and broadcast licensees or permittees to affirmatively show non-discrimination plans in employment practices and to complete annual reporting thereon. Through Notice of Proposed Rulemaking re-

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[11] Both tie to program content of mass communication media and relate to the bases upon which the FCC assesses the public performance of media facility owners under its licensing procedures, that in contradistinction to direct governmental control of programming. See Memorandum Opinion and Order and Notice of Proposed Rulemaking of the Federal Communications Commission released July 5, 1968, the initial order of that Commission in a series of actions, 33 F.R. 9960, 9961-2, which states in part:

> 9. * * * there is consideration that broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license. When these two considerations are taken together—the national policy against discrimination and the nature of broadcasting—we simply do not see how the Commission could make the public interest finding as to a broadcast applicant who is deliberately pursuing or preparing to pursue a policy of discrimination—of violating the national policy. In this respect—a mass media service to the public which is based entirely on a Federal license under a public interest standard —the situation clearly parallels the Federal policy in contract awards.
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> 11. The same question is raised when a substantial charge is made that a licensee is deliberately discriminatory in his employment policies. A refusal to hire Negroes or persons of any race or religion clearly raises a question of whether the licensee is making a good faith effort to serve his entire public. Thus, it immediately raises the question of whether he is consulting in good faith with Negro community leaders concerning programming to serve the area's needs and interests. Indeed, the very fact of discriminatory hiring policies may effectively cut the licensee off from success in such efforts.

leased June 28, 1971, that Commission initiated inquiry into proposed regulations relative to discrimination based upon sex as a part of that Commission's administrative law, 36 F.R. 12542. A rule was adopted and released on December 21, 1971, 36 F.R. 25012.

The action of the District of Columbia Public Service Commission in respect to equal opportunity employment practices of its regulatees, *Re Potomac Electric Power Company*, 83 PUR 3d 113, 147-8, 152-8 (1970), 84 PUR 3d 236, 246 (1970), rests upon specific authority in that Commission. This includes statutory provisions governing that agency, 43 DC Code 303, general federal law, Civil Rights Act of 1964, Executive Order No. 11246 and general police regulation, District of Columbia Commissioners Order No. 65-768 [12]. That Commission is currently considering this subject in relation to the Potomac Electric Power Company. See, PSC-DC, Formal Case No. 576, In the Matter of Investigation of Employment Practices of the Potomac Electric Power Company.

Recent cases before the California Public Utilities Commission have established that the PUC does not have jurisdiction over such employment practices of regulated entities, *NAACP et al* v. *All Regulated Public Utilities et al.*, Cal. P.U.C. Decision No. 77781, dated October 6, 1970, petition for writ of review denied the State Supreme Court unreported order, April 29, 1971; and *Re Pacific Gas & Electric Company*, 87 PUR 3d 270, 312 (1971). In substance, the California Commission found minority hiring practices to be a matter not within the scope of the state utility laws, but, rather, under the State Fair Employment Practice Act.

Petitioners refer to various state fair employment practice laws. We do not find regulatory jurisdiction in this

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[12] 43 DC Code 303 states: "The Commission shall have power * * * to require and compel every public utility to comply with * * * all other laws of the United States applicable, and any municipal ordinance or regulation relating to said public utility." DC Commissioners Order No. 65-768 (D.C. Police Regulations, Article 47, Section 4), is a general police regulation prohibiting employment discrimination based upon race, color, religion, national origin or sex.

Commission based upon those provisions. Moreover, as noted, *supra*, even the Equal Employment Opportunity Commission must defer to state agencies having jurisdiction in this area under an exhaustion of remedies principle.

We wish to make clear that should the Congress assign to this agency responsibility of the type proposed by petitioners, we would undertake the enforcement thereof as a matter of highest priority. We indicated in *Pacific Gas and Electric Company, supra*, 44 FPC 1368, our full commitment to "* * * the national policy that discrimination in employment is to be eliminated by all elements of our society, public and private. * * *".

Limitations of the Proposed Rule—As will be apparent from an examination of the rule as proposed by petitioners, the processing of any complaints thereunder before an agency such as this Commission, which must observe the requirements of the Administrative Procedure Act and general public disclosure procedures, 5 U.S.C. 551 *et seq.*, would inevitably do violence to the non-public disclosure principles of the Civil Rights Act, 86 Stat. 104, 42 U.S.C. 2000e-5(a), 78 Stat. 264, 42 U.S.C. 2000e-8(e). Complaints of discrimination under Section 9 of the proposed rule, or Section 10 intervenor actions, would be public information under this agency's procedures, 18 CFR 1.36(c). Charges of discrimination are not public under the Civil Rights Act, 86 Stat. 104. Similarly, a general public disclosure of annual employment reporting data (EEO-1), pursuant to Section 6 of the proposed rule, would appear to transcend the nondisclosure principle of the Civil Rights Act, 78 Stat. 264.

Additionally, the proposed rule transcends basic legal requirements of the Federal Power and Natural Gas Acts. The statutory bases upon which this Commission must judge particular applications are set forth in the two Acts. Section 11 of the proposed rule would have that judgment accomplished basically in accordance with standards of the Civil Rights Act and general public interest concepts. Also, the penalty and enforcement provisions of the Natural Gas and Federal Power Acts, 15

U.S.C. 717s, 717t, 16 U.S.C. 825m, 825n, 825o, relate to proscribed conduct under those Acts. Section 14 of the proposed rule is directed to other laws. Section 15 of the proposed rule presents a similar legal difficulty in respect to appellate review procedures. Natural Gas and Federal Power Acts, 15 U.S.C. 717r, 16 U.S.C. 8251. Section 13 of the proposed rule assumes authority in this Commission to provide counsel fees. This agency does not have such authority. See, *Power Authority of the State of New York*, Order Denying Motions and Appeals, —— FPC ——, issued October 29, 1971 (mimeo. ed., pp. 3-4).

Administratively, the rule, as proposed, would be duplicative of established procedures which now operate throughout the Nation in respect to equal employment opportunity. These procedures are as outlined, *supra*. The Department of Justice has instituted a number of enforcement actions under those procedures. See, for example, *United States* v. *Louisville Gas and Electric Company*, United States District Court for the Western District of Kentucky, Civil Action No. 7312-G, order June 30, 1972; *United States* v. *Piedmont Natural Gas Company*, United States District Court for the Western District of North Carolina, Civil Action No. 72-128, order June 15, 1972; *United States* v. *Virginia Electric and Power Company, et al.*, 327 F.Supp. 1034 (1971), 4 EPD Paragraph 7502 (1971); and, *United States* v. *Georgia Power Company*, 3 EPD Paragraphs 8143, 8318 (appeal pending USCA5, No. 71-344).

To adopt the proposed rule would (a) make the criminal penalties of the Natural Gas Act, 15 U.C.C. 717t, and the Federal Power Act, 16 U.S.C. 825o, apply to violations of whatever employment codes were adopted by the Commission, and there is no indication of Congressional intent for this result; (b) make the determination of a violation subject to administrative hearings rather than through trial in court, and the 1972 Act makes clear that the Congress intended a judicial, not an administrative, forum, pp. 10-11, *supra*; (c) make the determination of a just and reasonable rate turn on employment practices rather than upon adequate

and reliable service to consumers at the lowest reasonable rate. In our view, Congress has not indicated that consumers should pay higher rates to companies which have FPC approved employment plans and lower rates to companies which do not; (d) make the determination of whether new facilities to supply needed energy to all citizens can be licensed turn upon the question of whether the company proposing the facilities has an FPC approved employment plan. Conversely, facilities already supplying needed energy would presumably be shut down as a sanction for violation of an FPC approved employment plan. There is no indication that Congress intended such a result; and (e) make a further proliferation of agencies having concurrent jurisdiction at a time when Congress had made clear its intent to coordinate such activities. This agency could not "coordinate" with other agencies on cases which are controlled by the Administrative Procedure Act.

Thus, we conclude that the primary jurisdiction over labor and employment practices lies in other agencies, as petitioners recognize when their proposed rule calls for the FPC to defer to EEOC; we conclude that that jurisdiction is exclusive in those agencies. We further conclude that neither the Natural Gas Act and Federal Power Act delegate authority to FPC to regulate employment practices, and that we hold that since there is no jurisdiction to adopt such a rule, no purpose will be served by noticing such a rule for consideration for adoption in advance of a declaratory judgment determining the jurisdiction of the Commission.

The Commission further finds:

It is necessary and appropriate for the purposes of the Natural Gas Act and the Federal Power Act, 15 U.S.C. 717o, 16 U.S.C. 825h to order as hereinafter provided.

The Commission orders:

The petition, as described above, is hereby dismissed for lack of jurisdiction.

By the Commission.

[SEAL]

KENNETH F. PLUMB,
Secretary.

APPENDIX A

Rule As Annexed to Petition Filed With the Federal Power Commission June 22, 1972

Before the

FEDERAL POWER COMMISSION

Docket No. ————

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

PROPOSED RULE

Section 1. *Definitions.* As used in this rule: (1) "Commission" means the Federal Power Commission; (2) "licensee" means any person, State or municipality licensed under the provisions of section 4 of the Federal Power Act, and any assignee or successor in interest thereof; (3) "natural gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale; (4) "person" includes an individual or a corporation; (5) "public utility" means any person who owns or operates facilities subject to the jurisdiction of the Commission under Parts II or III of the Federal Power Act, and (6) "regulatee" means any licensee, natural gas company or public utility.

Sec. 2. *Policy.* The Commission finds and declares that: (1) Equal employment opportunity for all persons regardless of race, color, religion, sex or national origin is a national policy; (2) the furtherance of that national policy is a matter of the public interest, and (3) it shall, in each determination under the Federal Power

Act or the Natural Gas Act with respect to the public interest, give material consideration to such national policy.

Sec. 3. *Unlawful Employment Practices.* No regulatee shall (1) fail or refuse to hire or discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; (2) limit, segregate or classify its employees in any way which would deprive or tend to deprive any individual of employment opportunities of otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin; (3) discriminate in admission to, or employment in, any program of apprenticeship, training or retraining, including on-the-job training, on account of an individual's race, color, religion, sex or national origin; (4) discriminate against any employee or applicant for employment because such employee or applicant has opposed any employment practice made unlawful by Federal, State or local law or regulation or because he has in good faith made a charge of such practice or testified, assisted or participated in any manner in an investigation, proceeding or hearing of such practice by any lawfully constituted authority, or (5) print or publish or cause to be printed or published any notice or advertisement relating to employment by such regulatee, indicating any preference, limitation, specification or discrimination based on race, color, religion, sex or national origin, except where a preference or specification is for the purpose of remedying past practices of discrimination.

Sec. 4. *Equal Employment Opportunity Programs. Duties of Management.* Each regulatee shall establish, maintain, carry out and file with the Commission a written equal employment opportunity program, in which the regulatee shall commit itself to each of the following courses of action: (1) Define the responsibility of each level of management to insure a positive application and vigorous enforcement of the policy of equal employment opportunity, and establish a procedure to review and

control managerial and supervisory performance; (2) inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and secure their cooperation; (3) communicate the equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, sex, or national origin, and solicit their recruitment assistance on a continuing basis; (4) conduct a continuing campaign to exclude every form of prejudice or discrimination based on race, color, religion, sex or national origin from its personnel policies and practices and working conditions, and (5) conduct continuing reviews of job structure and employment practices and adopt positive recruitment, training, job design and other measures needed in order to insure genuine equality of opportunity to participate fully in all organizational units, occupations and levels of responsibility.

Sec. 5. *Equal Employment Opportunity Programs. Substantive Content.* Each regulatee shall include in its equal employment opportunity program such specific practices as the following:

(1) To assure nondiscrimination in recruiting: (a) Posting notices in the regulatee's employment offices informing applicants of their equal employment rights and their right to notify the Federal Power Commission or other appropriate agency if they believe they have been the victim of discrimination; (b) Planning a notice in bold type on the employment application informing prospective employees that discrimination on account of race, color, religion, sex, or national origin is prohibited and they may notify the Federal Power Commission or other appropriate agency if they believe they have been discriminated against; (c) placing employment advertisements in media which have significant circulation among minority groups and females in the recruiting area; (d) recruiting through schools and colleges with significant minority group and female enrollments; (e) maintaining systematic contacts with minority, human relations and female organizations, leaders and spokesmen

to encourage referral of qualified minority and female applicants; (f) encouraging present employees to refer minority and female applicants, and (g) making known to all recruitment sources that qualified minority and female persons are being sought whenever the company hires.

(2) To assure nondiscrimination in selection and hiring: (a) Instructing those of the regulatee's staff who make hiring decisions that all applicants for all jobs are to be considered without discrimination; (b) cooperating with unions in the development of programs to assure qualified minority and female personnel equal opportunity for employment and including an effective nondiscrimination clause in new or renegotiated union agreements, and (c) avoiding the use of selection techniques or tests which have the effect of discrimination against minority groups or females.

(3) To assure nondiscrimination in placement and promotion: (a) Instructing those of the regulatee's staff who make decisions on placement and promotions that minority and female employees are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed to determine whether this results from discrimination; (b) giving all employees equal opportunity for positions which lead to higher positions, and inquiring as to the interests and skills of all lower paid employees with respect to any of the higher paid positions, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such positions, and (c) reviewing seniority practices and seniority clauses in union contracts to insure that such practices or clauses are not discriminatory and do not have a discriminatory effect.

(4) To assure nondiscrimination in other areas of employment practices: (a) Examining rates of pay and fringe benefits for present employees with equivalent duties, and adjusting any inequities found, and (b) advising all qualified employees whenever there is an opportunity to perform overtime work.

Sec. 6. *Annual Employment Reports.* Each regulatee shall, contemporaneously with the filing of its EEO-1 form with the United States Equal Employment Opportunity Commission, file a copy thereof with the Commission.

Sec. 7. *Applicants to furnish equal employment information.* Each applicant for a license, renewal thereof, certificate of public convenience and necessity, rate change, permission to abandon a facility, permission to sell, lease or dispose of a facility, permission to merge facilities or any other permission or authorization in which the Commission is charged by law with protecting the public interest, shall include with its application (1) a report indicating the manner in which the specific practices undertaken pursuant to the regulatee's equal employment opportunity program have been applied and the effect of these practices upon the applications for employment, hiring and promotions of minority group members and females; (2) a report indicating whether any complaint has been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the applicant, including the persons involved, the date of filing, the court or agency before which the matter is or has been, the file number (if any), and the disposition or current status of the matter, and (3) a copy of the regulatee's last current EEO-1 form.

Sec. 8. *Affirmative Action Plans satisfactory.* In the case of any regulatee which is required to file an affirmative action plan with the Office of Federal Contract Compliance of the United States Department of Labor or any other Federal agency, a copy of such plan may be filed in lieu of the program required under the provisions of sections 4 and 5 of this rule.

Sec. 9. *Complaints of discrimination.* Any person who believe himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, by himself or by a representative, file a complaint with the Commission. The provisions of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations with respect to the processing of

complaints, the conduct of hearings and the issuance of decisions and orders shall apply to complaints filed under this section.

Sec. 10. *Intervention.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, in accordance with the provisions of section 1.8 of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations, participate in any proceeding involving applications for such authorizations or permissions as the Commission may give under statutory or other delegated authority administered by it.

Sec. 11. *Consideration of equal employment information in making public interest determinations and sanctions.* In each proceeding in which the Commission is charged by law with protecting the public interest, including but not limited to applications for licenses, certificates of public convenience or necessity, rate changes, permissions to abandon facilities, permissions to sell, lease or dispose of facilities and permissions to merge facilities, the Commission shall give material consideration to the information required to be provided under the provisions of sections 4, 5, 6 and 7 of this rule, and may deny, delay or condition any such license, certificate, rate change, or permission in accordance with such consideration.

Sec. 12. *Referrals and Deferrals to EEOC.* The Commission may refer any complaint involving a probable violation of any provision of Title VII of the Civil Rights Act of 1964, as amended, to the Equal Employment Opportunity Commission. If duplicate complaints are filed both with the Commission and with the Equal Opportunity Commission, the Commission shall defer jurisdiction and the Equal Employment Opportunity Commission will process the complaint.

Sec. 13. *Proceedings in forma pauperis.* The Commission shall, upon the filing of an affidavit of indigency by any complainant or intervener, provide reasonable counsel fees and copies of transcripts of hearings without charge.

Sec. 14. *Penalties.* The penalties prescribed for violations of the regulations or orders of the Commission under the provisions of section 21 of the Natural Gas Act and section 316 of the Federal Power Act shall apply to violations of this rule or of orders of the Commission issued pursuant thereto.

Sec. 15. *Court Review of Orders.* Any party aggrieved by an order of the Commission issued pursuant to this rule may apply for rehearing and court review of such order in accordance with the provisions of section 19 of the Natural Gas Act of section 313 of the Federal Power Act.

FEDERAL POWER COMMISSION
Washington, D.C. 20426
Equal Opportunity Employer

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. R-447

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

PETITION FOR REHEARING

of

The National Association for the Advancement of Colored People
The National Urban League
The Mexican American Legal Defense and Educational Fund
The National Organization for Women
The Women's Equity Action League
The League of United Latin American Citizens (in California)
The Association for the Betterment of Black Edison Employees
The Office of Communication of the United Church of Christ
The Center for Community Change
The American G.I. Forum (in California)
The Mexican American Political Association
United Native Americans, Inc.

Come now the above named petitioners and, pursuant to section 1.34 of title 18 of the Code of Federal Regulations, subsection (a) of section 717r of title 15 of the United States Code, and subsection (a) of section 8251 of title 16 of the United States Code, petition the FEDERAL POWER COMMISSION for a rehearing of the above numbered and captioned proceeding.

WHEREAS, on or about July 11, 1972, the Federal Power Commission issued an order dismissing the petition in this proceeding for lack of jurisdiction; and

WHEREAS, the grounds for this petition for rehearing are that the Federal Power Commission, in finding that it lacked jurisdiction over the issue of employment discrimination by its regulatees, erred as to matters of law; and that the Federal Power Commission, in denying petitioners' request for hearing and the opportunity to present oral argument, erred as a matter of law; and

WHEREAS, such errors of law include the Federal Power Commission's findings that (1) it lacks the requisite delegation of Congressional authority to act in the area of discrimination in the employment practices of its regulatees, (2) public interest considerations do not enfold the national policies against discrimination in employment, (3) nothing in the Constitution or the judicial interpretations thereof supports Commission regulation of discriminatory utility employment practices, and (4) jurisdiction over discriminatory employment practices lies exclusively with agencies other than the Federal Power Commission; and

WHEREAS, since the issuance of the Federal Power Commission's order of July 11, 1972, in this proceeding, the Chairman of the United States Equal Employment Opportunity Commission in a letter to the Chairman of the Federal Power Commission has communicated EEOC's desire to participate in any formal proceedings arising out of this petition; and

WHEREAS, such desire on the part of EEOC negates the finding by the Federal Power Commission that no purpose will be served by noticing petitioners' rule for consideration for adoption, in that a hearing will serve the purpose of allowing a sister agency of the United States government the opportunity to comment on the issues here presented.

NOW, THEREFORE, the petitioners respectfully pray the Federal Power Commission to REHEAR the petition which is the subject of this proceeding.

Respectfully submitted,

PETITIONERS,

by _____

WILLIAM L. TAYLOR

by _____

RAYMOND M. MARCIN

Center for National Policy Review
Catholic University Law School
Washington, D.C. 20017

Their Attorneys

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. R-447

EQUAL EMPLOYMENT OPPORTUNITY IN THE ELECTRIC AND GAS UTILITY INDUSTRY

VERIFICATION OF PETITION FOR REHEARING

District of Columbia :
: ss.
City of Washington :

July —, 1972

William L. Taylor, an attorney duly licensed to practice law in the District of Columbia and representing the petitioners herein, being duly sworn, deposes and says that he has read the foregoing petition for rehearing and know the contents thereof to be true, except as to matters and things, if any, stated on information and belief, and that, as to those matters and things, he believes them to be true.

WILLIAM L. TAYLOR

Subscribed and sworn to before me this — day of July, 1972, in the city of Washington, D.C.

Notary Public

APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C. 20506

July 13, 1972

[SEAL]

OFFICE OF
THE CHAIRMAN

Mr. John N. Nassikas
Chairman
Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20426

Dear Mr. Nassikas:

It is with great interest that I noted the filing on June 22, 1972, of a petition by 12 public interest groups requesting the Federal Power Commission to initiate rulemaking proceedings to require the regulated utilities industry to maintain equal employment opportunity in all its procedures and practices. I fully support the proposals contained in the petition and urge you to initiate rulemaking proceedings to allow all interested parties a chance to express their views on this issue.

The presence of discrimination in the utilities industry is a matter of public record. In a report issued by this Commission on the utilization of minorities and women in the utilities industry, we found that employment discrimination was pervasive throughout the industry.[1] Similarly, in a recent study, Professor Bernard E. Anderson of the Wharton School of Finance and Commerce concluded that little progress has been made by govern-

[1] EEOC, *Employment Patterns in the Utilities Industry*, 1966-67.

ment agencies to eliminate employment discrimination in the industry.[2]

In November of last year, this Commission held public hearings to ascertain whether the utilities companies utilization of minorities and women accorded equal employment opportunity. The conclusions reached as a result of the information provided during these hearings were that there exists pervasive, industry-wide discrimination in all areas of employment. For example, it was determined that the utilities industry employs fewer minorities and women than the average employed by all employers in the Nation. This underutilization is the result of discriminatory employment practices.

The issue of the employment practices of the utilities industry was again raised this year by the House Committee on the Judiciary.[3] Coincident to the hearings, the U.S. Department of Justice, the U.S. Commission on Civil Rights, and this Commission expressed the view that the FPC should undertake regulation of the employment practices of the regulated utilities industry.[4] The Federal Communications Commission has already instituted rules and regulations to regulate the employment practices of the Communications industry,[5] and the Interstate Commerce Commission is presently engaged in rulemaking to decide its role in regulating the employ-

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[2] B. Anderson, *The Negro In The Public Utility Industries* Univ. of Pa. Press 1970).

[3] *See*, "Responsibilities of the Federal Power Commission in the Area of Civil Rights," Hearings before the Civil Rights Oversight Subcommittee of the Committee on the Judiciary, House of Representatives, 92nd Cong. 1st Sess. (1972).

[4] *See* Letter from David L. Norman, Assist. Attorney General for Civil Rights, U.S. Dept. of Justice, *id.* at 65; letter from Rev. Theodore M. Hesburgh, Chairman, U.S. Commission on Civil Rights, *id.* at 123; letter from William H. Brown III, Chairman, Equal Employment Opportunity Commission, id. at 121.

[5] *See* 23 F.C.C. 2d 430 (1970) (broadcast rules); 24 F.C.C. 2d 725 (1970) (Commoncarrier rules); 34 F.C.C. 2d 186 (1972) (cable television rules).

ment practices of the surface transportation industry (Ex Parte No. 278).

I sincerely hope that the Federal Power Commission will similarly undertake to issue proposed rules and regulations to require equal employment opportunity in the regulated utilities industry. The major public policy considerations which are involved in equal employment opportunity require that all segments of the Federal Government responsible for insuring the public interest act to eliminate the undesirable effects of employment discrimination. This Commission would look forward to cooperating with the FPC in this vital area and would be glad to provide whatever assistance you may feel necessary in the development of an equal employment opportunity program for the utilities industry. Our experience during the last seven years in administering Title VII of the Civil Rights Act of 1964 has given us invaluable experience in employment discrimination problems, and some of this information may be very helpful to your agency in this area. We would, of course, also wish to participate in any formal proceeding which may be initiated by the FPC.

If I can be of any further assistance to you in this area, please feel free to call on me.

Sincerely,

/s/ William H. Brown III
WILLIAM H. BROWN III
Chairman

cc: Raymond B. Marcin
Catholic University Law School

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Comissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Pinkney Walker.

Docket No. R-447

The National Association for the Advancement of Colored People
The National Urban League
The Mexican American Legal Defense and Education Fund
The National Organization for Women
The Women's Equity Action League
The League of United Latin American Citizens (in California)
The Association for the Betterment of Black Edison Employees
The Office of Communications of the United Church of Christ
The Center for Community Change
The American G.I. Forum (in California)
The Mexican American Political Association
United Native Americans, Inc.

ORDER DENYING PETITION FOR REHEARING

(Issued August 21, 1972)

Petitioners in the above-entitled matter on August 8, 1972, filed a petition for rehearing of Commission Opinion No. 623, Declaratory Opinion and Order on Petition for Issuance of a Rule Relative to Employment Practices, issued July 11, 1972. Petitioners annex to their petition a letter of Chairman William H. Brown, III, Equal Employment Opportunity Commission, dated July 13,

1972, addressed to the Chairman of the Federal Power Commission.

The assignments of error and grounds for rehearing set forth in the petition, including Chairman Brown's letter, set forth no new facts or principles of law which were not fully considered by the Commission when it issued its Opinion No. 623, or which, having now been considered, warrant any modification of that Opinion. Opinion No. 623 dismissed for lack of jurisdiction a petition filed June 22, 1972.

The Commission further finds:

It is necessary and appropriate for the purposes of the Natural Gas Act and the Federal Power Act, 15 U.S.C. 717o, 16 U.S.C. 825h, 1, to order as hereinafter provided.

The Commission orders:

The petition for rehearing of Commission Opinion No. 623, issued July 11, 1972, is hereby denied.

By the Commission.

[SEAL]

MARY B. KIDD,
Acting Secretary.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the Federal Power Commission by depositing 6 copies thereof in the United States mail, postage prepaid and addressed to:

Mr. George W. McHenry, Jr.
First Assistant Solicitor
Federal Power Commission
441 G Street, N.W.
Washington, D.C. 20426

Dated at Washington, D.C. this — day of April, 1973.

WILLIAM L. TAYLOR

SUPREME COURT OF THE UNITED STATES

No. 74-1608

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ORDER ALLOWING CERTIORARI. Filed October 14, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 74-1619 and a total of one hour is alloted for oral argument.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

SUPREME COURT OF THE UNITED STATES

No. 74-1619

FEDERAL POWER COMMISSION, PETITIONER

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 14, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with No. 74-1608 and a total of one hour is allotted for oral argument.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

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Nos. 74-1608 and 74-1619

Supreme Court, U. S.
FILED
AUG 15 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

FEDERAL POWER COMMISSION, PETITIONER

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

ROBERT H. BORK,
Solicitor General,

J. STANLEY POTTINGER,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

ABNER W. SIBAL,
General Counsel,
Equal Employment Opportunity Commission,
Washington, D.C. 20506.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1608

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

No. 74-1619

FEDERAL POWER COMMISSION, PETITIONER

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The United States and the Equal Employment Opportunity Commission are responsible for enforcing Title VII

of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*, which prohibits discriminatory employment practices. The decision in this case, which involves the authority of the Federal Power Commission to proscribe, or to take account of, discriminatory employment practices by persons subject to its regulatory jurisdiction, may affect the *amici's* enforcement responsibilities.[1]

STATEMENT

On June 22, 1972, the National Association for the Advancement of Colored People and a number of other civil rights organizations (cross-petitioners herein) petitioned the Federal Power Commission to issue a rule providing for the comprehensive regulation by the Commission of the equal employment practices of the companies it regulates.[2] The Commission dismissed the petition for lack of jurisdiction, stating that it has no statutory authority to regulate the employment practices of its regulatees (Pet. App. 42a-74a).

On petition for review, the court of appeals vacated the Commission's order and remanded the case for further proceedings (*id.* at 1a-40a). The court held, in an exhaustive opinion, that "the Commission is neither empowered nor required to adopt the rule as proposed" (*id.* at 8a). Congress did not intend "for the Commission to entertain and to adjudicate individual complaints of employment dis-

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[1]EEOC accordingly filed a brief as *amicus curiae* in the court of appeals in this case.

[2]The rule that was proposed by cross-petitioners is reproduced at Pet. App. 34a-40a. ("Pet. App." refers to the appendix to the Federal Power Commission's petition for a writ of certiorari, No. 74-1619.)

crimination by its regulatees, and to impose sanctions unrelated to the performance of its central regulatory purposes" (*id.* at 24a-25a).

The court also held, however, that the Commission's statutory responsibility to ensure "that no unnecessary or illegitimate costs are passed along to [the] consumer" carries with it the limited authority to take into account, in the discharge of its usual regulatory functions, the "[c]osts incurred by reason of a regulatee's choosing to practice racial discrimination" (*id.* at 25a). The court enumerated the following costs as "indicative of those arguably within the Commission's range of concern" (*ibid.*):

> (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination, (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion. [*Id.* at 25a-26a; footnote omitted.]

The court recognized that some of these possible costs might be "very questionable and virtually unquantifiable" and that "[t]he problem of how to see that they are not borne by the consumer could arise in any number of differ-

ent regulatory contexts" (*id.* at 26a). It accordingly left for the Commission to determine in the first instance the manner in which to approach the problem as part of its normal regulatory functions (*ibid.*). The court reiterated, however, that "[t]he line is always to be drawn between regulation reasonably related to the Commission's central functions," which is permitted, "and regulation of employment discrimination for its own sake," which is prohibited (*id.* at 27a).

Although the court held that the Commission was not empowered to adopt the rule proposed by cross-petitioners, it remanded the case for further proceedings rather than affirming the Commission's dismissal. "Not wishing to be understood either to imply by a reversal that the petitioners' proposed rule could be adopted as is, or to endorse by an affirmance the Commission's broad disavowal of any jurisdiction over racial discrimination by its regulatees, we have concluded that the wisest course is to vacate the Commission's order and remand for further proceedings consistent with this opinion" (*id.* at 33a).

The court stated that some portions of the proposed rule might be within the scope of the Commission's authority to promulgate. "[T]hose sections providing for the annual filing with the Commission of a form [containing employment statistics by race, sex, and national origin] already due the EEOC * * *, and for intervention and receipt of evidence in Commission proceedings * * *, might well be viewed as orderly methods of bringing to the Commission's attention information which could be relevant to its deliberations in the ways described in * * * this opinion" (*id.* at 31a).

The court also made clear, however, that the Commission has "considerable discretion, in common with other agencies, not to promulgate rules even when it has the authority to do so" (*id.* at 33a, n. 53). Thus, "[t]he Commission might well determine that rule making in the area of employment discrimination, though permissible, should be deferred at least temporarily in favor of the information and experience to be gained from case-by-case consideration of such matters as they arise in normal rate making and licensing proceedings" (*ibid.*).

DISCUSSION

In our view, the questions presented by the petition and the conditional cross-petition were decided correctly by the court of appeals, and further review is not warranted.

1. The Commission acknowledges that "[c]osts are * * * in issue in any rate proceeding just as compliance with the laws is a fair consideration in licensing proceedings" (Pet. 6). It states, however, that "it does not follow that the Commission may regulate the activities which generate those costs or to require affirmative actions before the Commission to comply with laws it is not mandated by Congress to enforce" (*ibid.*).

That statement, in our view, is a paraphrase of, rather than an attack upon, the holding of the court of appeals. It is the Commission's petition, not the court's decision, that "has confused the consideration of whether to allow certain costs in ratemaking, however incurred, with the consideration and regulation of employment discrimination affecting costs" (Pet. 7). The court did not say that the Commission may or must regulate its regulatees' employment practices whenever those practices

are reflected in higher costs. It said only that the Commission may consider the reasonableness of such costs in a rate proceeding and may consider in the context of a certificate or license renewal proceeding the effect that such costs may have on a company's stability and soundness. That is not regulating employment practices. It is simply taking employment discrimination into account when it has an effect on those things that the Commission does regulate.

The Commission's fear that the court's ruling "would impose an impractical burden on the Commission and would severely impair the ability of the Commission to discharge its statutory responsibilities" (Pet. 8-9) is unfounded. It may be true, as the Commission states, that "[t]he decision would encourage parties in litigation at the Commission to seek the introduction of a large mass of material and issues unrelated to the Commission's area of expertise and * * * not directly related to utility costs or ability to provide service, but concerned with their compliance with the equal opportunity employment requirements of other laws and other agencies" (Pet. 9). It is equally true, however, that under the court of appeals' decision, properly understood, those issues would be irrelevant and the evidence relating to them could properly be excluded.

The Commission understandably is concerned that it "lacks both the staff and the technical expertise to investigate and quantify the hypothetical costs of employment discrimination" alluded to in the court's opinion (Pet. 12). But the court was sensitive to that concern; it recognized that some of the costs it mentioned might prove to be "very questionable and virtually unquanti-

fiable" (Pet. App. 26a). It was for this reason that the court left it to the Commission's broad administrative discretion to consider how best to approach the problem, either by rulemaking or in case-by-case adjudication.

If, as the Commission says (Pet. 12-13), it is not equipped to consider in any meaningful way some of the costs identified by the court of appeals, then it need not do so. The costs enumerated in the court's opinion were characterized only "as indicative of those *arguably* within the Commission's range of concern" (Pet. App. 25a; emphasis added). There is no reason to anticipate at this stage that a reasoned explanation by the Commission of its inability meaningfully to consider a particular cost element in a particular regulatory context will be rejected as inadequate by the court.[3]

2. Cross-petitioners contend (Cross-Pet. 9-14) that "the statutory charge of the FPC to regulate in the public interest is a broad authorization that includes a duty to proscribe discriminatory employment practices through the exercise of its rule-making capacity" (Cross-Pet. 13). As the court of appeals correctly concluded, however, "Congress has not charged the Commission with advancing *all* public interests, but only the public's interest in having the particular mandates of the Com-

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[3]For example, where, as in natural gas producer rate regulation, the Commission does not ordinarily consider costs on a company-by-company basis (see Pet. 11), it may be impractical to take meaningful account of an individual firm's employment discrimination costs. We do not read the court's opinion as requiring the Commission to alter its usual regulatory methods in such a situation.

mission carried out, its interest, in other words, in the conservation of natural resources and the enjoyment of cheap and plentiful electricity and natural gas" (Pet. App. 19a; emphasis in original).

Cross-petitioners also argue (Cross-Pet. 16-20) that, apart from the Commission's statutory obligations, it has a duty under the Fifth Amendment to prevent employment discrimination by its regulatees. The difficulties with cross-petitioners' analysis are explored in the court's opinion (Pet. App. 27a-30a). Even if the existence of a "'state-action' relationship" (*id.* at 30a) between the Commission and its regulatees is assumed, the Constitution does not require the Commission to regulate in a manner that exceeds its statutory authority and administrative expertise.

Cross-petitioners argue (Cross-Pet. 14-16) that the court of appeals erred in declining to require the Commission to promulgate rules to effectuate its limited jurisdiction over discrimination-related costs. The contention is answered by this Court's decisions in *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202-203, and *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295. As those decisions make clear, "the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion" (*id.* at 294).

This is not a situation in which the Commission's "reliance on adjudication would amount to an abuse of discretion or a violation of the Act" (*ibid.*). As the court of appeals stated, the Commission might well reasonably prefer to proceed cautiously on the basis of "information and experience to be gained from case-by-case consideration of such matters as they arise in normal rate making and licensing proceedings" (Pet. App. 33a, n. 53).

CONCLUSION

The petition and conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

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THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statement	3
Argument	8
I. The Federal Power Commission Has No Authority to Consider Coincidentally to the Performance of Its Reguatory Functions Under The Federal Power Act and The Natural Gas Act, Evidence That A Regulatee Is A Demonstrated Discriminator in Its Employment Relations	12
A. The Decision Of The Court Of Appeals Erroneously Held That Limited Jursidiction To Consider Employment Discrimination Exists In The Federal Power Commission	12
B. The Fifth Amendment Does not Require That A Federal Agency Act Affirmatively To Prohibit Any Employment Discrimination By Companies Regulated By The Agency	31

598-034—75——1

Page

II. If Limited Jurisdiction To Consider Employment Jurisdiction Exists With The Federal Power Commission, It Is Not Required To Issue Rules To Prevent Employment Discrimination ---------- 40

Conclusion ---------- 43

CITATIONS

Cases:

	Page
Alabama Electric Cooperative, Inc. v. *S.E.C.*, 353 F. 2d 905 (C.A. D.C. 1965), certiorari denied, 383 U.S. 970	16
Burton v. *Wilmington Parking Authority, et al.*, 365 U.S. 715	33, 39
Civil Rights Cases, 109 U.S. 3	32, 33, 34, 37
City of Chicago v. *F.P.C.*, 385 F. 2d 629, (C.A. D.C. 1967), certiorari denied, 390 U.S., 945	19
Columbia Broadcasting System v. *United States*, 316 U.S. 407	42
Cooper v. *Aaron*, 358 U.S. 1	33
F.P.C. v. *Natural Gas Pipeline Co.*, 315 U.S. 575	17
Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266	23
Federal Trade Commission v. *Keppel & Bro.*, 291 U.S. 304	42
Green v. *Kennedy*, 309 F. Supp. 112 (D.D.C. 1970) *affirmed sub nom., Coit* v. *Green*, 404 U.S. 997	34, 35, 36
Griggs, et al. v. *Duke Power Company*, 401 U.S. 424	20
Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345	11, 33, 38, 39
Johnson v. *Railway Express Agency*, 489 F. 2d 525 (C.A. 6 1973), certiorari granted, 417 U.S. 929	22
McLean Trucking Co. v. *U.S.*, 321 U.S. 67	17
Mobil Oil Corp. v. *F.P.C.*, 417 U.S. 282	29

	Page
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163	34, 37
NAACP v. *Pennsylvania Public Utilities Commission*, 5 Pa. Cm. Ct. 312, 290 A. 2d 704, 95 PUR 3d, 451 (Pa. 1972)	18
National Broadcasting Co. v. *U.S.*, 319 U.S. 190	23
New York Central Securities Co. v. *U.S.*, 287 U.S. 12	17
Office of Communications of the United Church of Christ v. *F.C.C.*, 359 F. 2d 944 (C.A. D.C. 1966)	23
Pacific Gas and Electric Co., 44 FPC 1365, (1970)	9
Permian Basin Area Rate Cases, 390 U.S. 747	17, 30
Placid Oil Co. v. *F.P.C.*, 483 F. 2d 880 (C.A. 5 1973)	28
Red Lion Broadcast Co. v. *F.C.C.*, 395 U.S. 367	23
Sams v. *Ohio Valley Hospital Ass'n*, 413 F. 2d 826 (C.A. 4 1969)	39
S.E.C. v. *Chenery Corp.*, 332 U.S. 194	41, 42
Simkins v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (C.A. 4 1963), certiorari denied 376 U.S. 938 (1964)	39
Southern Steamship Co. v. *N.L.R.B.*, 316 U.S. 31	19
United Packinghouse, Food & Allied Workers International Union v. *N.L.R.B.*, 416 F. 2d 1126 (C.A.D.C. 1969) certiorari denied, 396 U.S. 903	22
Ward v. *St. Anthony Hospital*, 476 F. 2d 671 (C.A. 10 1973)	39
Statutes:	
Civil Rights Act of 1964, 42 U.S.C. 1981 *et seq.*	
Title VI, 42 U.S.C. 2000d	21

Page

Title VII, 42 U.S.C. 2000e 20, 21, 22
Federal Communications Act of 1934, 47 U.S.C. 151, *et seq* 23
Federal Power Act, 49 Stat. 803, 838 (1935), *as codified* 16 U.S.C. 824–825 (1970) 2, 15, 16, 24
Section 309, 16 U.S.C. 825h 40
Federal Water Power Act, 41 Stat. 1063 (1920), as amended 16 U.S.C. 791–823 (1970) 15, 16
Natural Gas Act, 52 Stat. 821, *et seq.*, as codified, 15 U.S.C. 717, *et seq* 2, 16, 24
Section 4, 15 U.S.C. 717c 28
Section 7, 15 U.S.C. 717F 28
Section 16, 15 U.S.C. 717o 40
Regulations and Notices of Proposed Rulemaking:
Federal Communications Commission,
47 C.F.R. 21.307 22
47 C.F.R. 76.311 22
40 Fed. Reg. 31625 22
Federal Power Commission,
Uniform System of Accounts, 18 C.F.R. Parts 101, 104, 201, 204 ..... 25, 27
Securities and Exchange Commission,
37 Fed. Reg. 28767 24
39 Fed. Reg. 2809 24
Securities Act Release No. 5170 & Exchange Act Release No. 9252 24
Securities Act of 1933 Release No. 5627 & Securities Exchange Act of 1934 Release No. 11733 24
Civil Aeronautics Board,
37 Fed. Reg. 15518 (1972) 24
Interstate Commerce Commission,
36 Fed. Reg. 10741 (1971) 24

Miscellaneous:

	Page
FPC 1975 Annual Report to Congress	29, 30
FPC Budget Estimates, Submission to Office of Management and Budget, Fiscal Year 1975	30
Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess	41

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OCTOBER TERM, 1975

No. 74-1619

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) [1] is reported at 520 F. 2d 432. The initial

[1] "Pet. App." references are to the appendices to the petition in No. 74-1619.

opinion and order (No. 623) of the Federal Power Commission (Pet. App. 42a–74a) and the opinion (No. 623–A) denying rehearing (Pet. App. 75a–76a) are reported at 48 FPC 40 and 48 FPC 371, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41a) was entered on February 5, 1975. On May 2, 1975, the Chief Justice extended the Commission's time for filing a petition for a writ of certiorari to and including June 20, 1975.

The petition for a writ of certiorari was filed in No. 74–1619 on June 20, 1975. A cross-petition for a writ of certiorari was filed on June 20, 1975, by the National Association for the Advancement of Colored People, *et al.* in No. 74–1608. On October 14, 1975, the Court granted both petitions and consolidated the cases. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1), Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTIONS PRESENTED BY THE FEDERAL POWER COMMISSION

1. Whether the Federal Power Commission correctly determined it has no authority to consider coincidentally to the performance of its regulatory functions under the Federal Power Act, 16 U.S.C. 791a, *et seq.* and the Natural Gas Act, 15 U.S.C. 717, *et seq.* evidence that a regulatee is a demonstrated discriminator in its employment relations.

BY THE NAACP

1. Whether the Federal Power Commission, pursuant to its mandate to regulate in the "public interest," has both statutory authority and responsibility broadly to proscribe employment discrimination in the industries it regulates.

2. Whether, having found that the Federal Power Commission had jurisdiction over employment discrimination for the limited purpose of protecting consumers from illegitimate costs, the court below erred in refusing to require the agency to adopt rules to effectuate its jurisdiction.

3. Whether the Federal Power Commission, by reason of its extensive involvement in the regulation of the gas and electric utility industries, has a Constitutional duty to proscribe employment discrimination by the companies it regulates.

STATEMENT

1. On June 22, 1972, The National Association for the Advancement of Colored People *et al.* (NAACP) petitioned the Federal Power Commission (Commission) to issue a rule which would regulate the employment practices of its regulatees. Attached to the petition was a proposed rule dealing with equal employment opportunity in the electric and gas utility industries (Pet. App. 34a–40a). NAACP claimed that the Commission had authority to regulate these matters under various sections of the Federal Power Act and the Natural Gas Act, the two Acts which the Commission primarily administers. It was further

contended that since there was a national policy against employment discrimination, the "public interest" standard, as used in various sections of these Acts, necessarily includes that national policy. Finally, NAACP urged that the Constitution required the Commission to regulate the employment practices of the regulatees.

On July 11, 1972, the Commission issued Opinion No. 623 which dismissed the petition for lack of jurisdiction (Pet. App. 42a–74a). The Commission stated that it lacked the requisite Congressional authority to promulgate equal employment practices of those companies which it regulates. The Commission pointed out that there was nothing in the legislative history or the specific sections of either of these acts which would extend its regulatory authority into the internal labor-management problems of its regulatees. To the suggestion that the "public interest" standard expanded its jurisdiction into this area, the Commission responded that Congress did not charge it with regulating all matters affecting the public welfare. Rather, "[a]pplication of public interest concept in the context of any given regulatory statute presupposes inquiry into and observance of, the legislative purposes of the Act" (*id.* at 47a). The Commission added that "the Purposes of the Natural Gas and Federal Power Acts are economic regulation of entrepreneurs engaged in resource development" (*ibid.*). Finally, with regard to the constitutional arguments, the Commission found that regulation under these two Acts did not significantly involve the fed-

eral government with any alleged discriminatory employment practices of its regulatees in a way which served to deny any person equal protection of the laws.

2. A petition for review was filed by NAACP. Upon review, the court of appeals disagreed with the Commission's assessment of its jurisdiction and vacated and remanded the orders. The court distinguished between "two kinds of jurisdiction" in evaluating the limitation of Commission authority. The first type of jurisdiction would be over employment discrimination *per se*—a power to, "prescribe personnel practices in detail and to receive complaints, adjudicate them and punish directly infractions of those practices" (Pet. App. at 7a). The second would be a, "power to take into account, in the performance of its regulatory functions, including licensing and rate review, evidence that the regulatee is a demonstrated discriminator in its employment relations" (*id.* at 8a). The Court concluded that the Commission lacks the former type of authority but possesses the latter.

The Court ruled that the Commission's power to regulate employment discrimination *per se,* if it existed at all, could only exist if it were found, "among the Commission's statutorily defined objectives" (*id.* at 16a). The objective of the statutes administered by the Commission was, according to the court, "to insure the efficient performance of an industry in which the normal forces of competition are * * * not equal to the task" (*id.* at 16a–17a).

With respect to NAACP's argument that the "public interest" standard would embrace prevention of employment discrimination, the court concluded, "that Congress has not charged the Commission with advancing *all* public interests, but only the public's interest * * * in the conservation of natural resources and the enjoyment of cheap and plentiful electricity and natural gas" (*id.* at 19a).

The court, however, did find authority for "FPC Regulation of Employment Discrimination Coincidentally to Proper Commission Concerns" (*id.* at 24a). The court reasoned that the Commission's primary responsibility of "protecting the consumer against exploitation" could "be alternatively described as the task of seeing that no unnecessary or illegitimate costs are passed along to that consumer" (*id.* at 25a). And the court found, "[c]osts incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility" (*ibid.*). The court identified costs "arguably within the Commission's range of concern" as follows (*id.* at 25a–26a):

> (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination, (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of discrimination, (5) exces-

> sive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment and promotion [footnote omitted].

The court did not limit the Commission's responsibility to disallowing quantifiable costs, but suggested further that, "a regulatee with a very poor equal employment opportunity record might be presumed to have incurred excess labor costs * * *, and that these costs, being difficult to quantify and prove, will be rebuttably presumed to equal a certain percentage of actual labor costs" (*id.* at 27a).

With respect to licensing, the court viewed the Commission's authority as extending beyond consideration of identifiable costs: "[i]t is conceivable that an applicant's record could be so riddled with discrimination-related legal difficulties * * * that the Commission could validly conclude that for this reason it should not be permitted to be the recipient of franchise grants" (*id.* at 26a).

The court also held, with respect to the Commission's rulemaking powers, that the Commission should consider the promulgation of rules requiring filing with it of forms now required by the Equal Employment Opportunity Commission (EEOC) and rules permitting intervention by any person believing himself aggrieved by an employment practice (*id.* at 31a, 39a–40a).

Finally, passing beyond the question of whether the Commission's regulation of its regulatees was "state action" involving the agency in the companies' discrimination, the court concluded that, even if such a relationship existed, "the Constitution [does not] * * * compel * * * the legislature affirmatively to legislate in a certain way" (*id.* at 30a). The court concluded that the Constitution does not require the Commission affirmatively to regulate employment discrimination.

SUMMARY OF ARGUMENT

A. While accepting that the Commission has no power to regulate employment discrimination *per se,* the court found, in the Commission's unquestioned jurisdictional authority to disallow illegal costs, an ancillary power to " 'regulate' employment discrimination" coincidentally to that regulatory concern. While we do not question the premise that the Commission has jurisdiction to disallow unjust and unreasonable costs, we submit that the powers to regulate employment discrimination which the court of appeals found, cannot reasonably be derived from that premise. Thus, in addition to disallowing quantifiable costs such as back pay awards, the court found authority to "rebuttably presume" illegal costs from a history of discrimination, or to refuse a license altogether because of such history. The court also found authority in the Commission to issue rules requiring the filing with it of forms required by the Equal Employment Opportunity Commission and to require intervention by

individuals believing themselves to be victims of discrimination.

These powers—if the Commission possessed them—would for practical purposes require the Commission to regulate employment practices. There is no practical difference between prescribing employment practices and disallowing a portion of a rate increase or denying a license on the grounds of discriminatory employment practices. Similarly, there is little difference between adjudicating individual complaints and permitting intervention by, and the receipt of evidence from, individuals believing themselves aggrieved by an employment practice.

The effect of the court's decision below is contrary to the legislative history of the relevant statutes as determined by that court; nor can support for its decision be found in the Constitution.

The Commission readily adheres to its limited affirmative civil rights responsibilities as required by law: as an employer and agency of the federal government it meets statutory requirements concerning employment; as the agency designated to assure nondiscriminatory use of multipurpose hydro-electric facilities by all persons, regulations and other orders have been issued by the Commission. The Commission's efforts in responding to those mandates have not been contested. In *Pacific Gas and Electric Co.* 44 FPC 1365, 1367–8 (1970), *appeal dropped,* the Commission indicated it does not countenance discriminatory treatment in respect to the rendition of utility services which it regulates.

The Commission is of course cognizant and also fully supportive of the national policies of this Nation directed at eliminating all types of discriminatory treatment of persons based upon race, creed, color, religion, sex or national origin (Pet. App. 44a). The Commission stated in its Opinion below that "should the Congress assign to this agency responsibility of the type proposed by petitioners, we would undertake the enforcement thereof as a matter of highest priority." (Pet. App. 62a). Nevertheless, the Commission may not undertake that for which it has no authority mandated by Congress nor otherwise required by the Constitution.

The decision also imposes an impractical burden on the Commission and severely impairs the ability of the Commission to discharge its statutory responsibilities because of the Commission's lack of staff and technical expertise in that broad field. The Commission's statutory mandate was not intended, and therefore lacks the necessary flexibility, to provide adequate sanctions for violations of employment discrimination laws. The economic consequences of withholding license authorization or denying a rate adjustment would be far-reaching and offer overly narrow sanctions inconsistent with the remedial sanctions otherwise provided by Congress for such violations.

Employment discrimination is an area over which, as found by the court of appeals, the Congress spe-

cifically desired not to diffuse authority and accordingly centralized responsibility in the Equal Employment Opportunity Commission (Pet. App. 21a). Congress did not intend for the Commission to enter other areas of jurisdiction such as employment practices, child labor, minimum wage violations, or strikes and lockouts. If the Commisison is to become a forum for the airing of employment discrimination disputes, legislation, not adjudication, is first required.

The Fifth Amendment to the Constitution does not dictate administrative agency rules, regulations, and consideration of known or alleged discriminatory employment practices by companies they regulate. The far-reaching implications of this proposition sought by NAACP in No. 74-1608 were recognized and rejected by the court below.

No governmental action which the Commission takes denies any person of equal protection of the laws. The Commission's regulatory activities neither originate, enforce, nor foster private employment discrimination. The acts of the Commission's regulatees are not "state action" subject to the Constitution, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345. The Constitution does not otherwise dictate governmental control of private actions.

B. Alternatively, if limited jurisdiction over employment is held to exist, the court below correctly recognized the Commission's authority to act affirmatively does not compel the issuance of rules.

598-034—75——3

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ARGUMENT

I

THE FEDERAL POWER COMMISSION HAS NO AUTHORITY TO CONSIDER COINCIDENTALLY TO THE PERFORMANCE OF ITS REGULATORY FUNCTIONS UNDER THE FEDERAL POWER ACT AND THE NATURAL GAS ACT, EVIDENCE THAT A REGLATEE IS A DEMONSTRATED DISCRIMINATOR IN ITS EMPLOYMENT RELATIONS

A. THE DECISION OF THE COURT OF APPEALS ERRONEOUSLY HELD THAT LIMITED JURISDICTION TO CONSIDER EMPLOYMENT DISCRIMINATION EXISTS IN THE FEDERAL POWER COMMISSION

1. The Commission agrees with the statement of the court of appeals that the Commission lacks power, "to regulate employment discrimination *per se*, a power, in other words, to act to curtail employment discrimination merely for the sake of seeing that practice curtailed" (Pet. App. 15a, and see also 24a–25a). The Commission submits, however, that the court erred in finding that the Commission does have power to "'regulate' employment discrimination" coincidentally to other proper regulatory concerns (*id.* at 26a).

The court premised its finding of the latter kind of power upon the Commission's undoubted responsibility of "protecting the consumer against exploitation," including the payment of "unnecessary or illegitimate costs" (*id.* at 25a). Our difference with the court of appeals is not over this premise, but the improper and illogical inferences which the court drew from the premise. The court hypothesized a

series of possible costs ranging from back pay awards to the cost of inefficiency stemming from demoralization (see *supra,* at pp. 6–7). While admitting that some of its suggested costs were "virtually unquantifiable" (Pet. App. 26a), the court implied that the Commission must attempt such quantification. Where exact quantification was impossible, but employment discrimination shown, the court suggested that some unspecified percentage of labor costs be "rebuttably presumed" to be illegal (*id.* at 27a, see *supra,* at 7).

With respect to licensing, the court abandoned the quest for quantification altogether and suggested that an otherwise qualified applicant with a poor record in racial matters could be denied a license (Pet. App. at 26a, see *supra,* at 7). The court also suggested that regulatees might appropriately be required to file Form EEO–1 with the Commission, and that alleged victims of discrimination should be allowed to intervene in any Commission proceeding (Pet. App. at 31a, see, *supra,* at 7).

With this conjury of powers, the court, through the medium of disallowing illegal costs, has for practical purposes required the Commission to regulate the employment practices of its regulatees. The court of appeals' reasoning thus conflicts with its initial holding that there is no jurisdiction to prescribe in detail personnel practices, and to receive and to adjudicate complaints, and to impose sanctions for infractions unrelated to its central regulatory purpose (Pet. App. 24a-25a). There is no practical distinc-

tion between prescribing personel practices and disallowing portions of rate filings or denying license applications on the grounds personnel practices are not in compliance with either the Commission's determination of proper employment practices or a minimum allowable level of employment complaints. Nor is there any effective distinction between receiving and adjudicating discrimination complaints and, as the court of appeals would have the Commission do, permitting intervention by a person who believes he or she has been subjected to discrimination and hearing evidence upon that grievance in order to sanction the regulatee via rate or certificate action.

The court of appeals recognized the power to regulate employment discrimination *per se* is a power to prevent it merely for the sake of seeing that practice curtailed. The court nevertheless suggests the Commission has the power to disallow portions of rate filings or deny license applications solely because employment discrimination exists. Such action would serve no fundamental purpose other than regulating employment discrimination. The styling of the proceeding may vary but the effective agency action does not. In either event the agency sanction would be grounded upon evidence of discriminatory activity.

Moreover, the remedy is harsher in the latter case. The impact of a corrective Commission order upon an individual complaint, which the court of appeals held would be outside Commission jurisdiction, would be far less draconian than the Commission's denial of

a primary application of a regulatee: a harsh and inflexible all-or-nothing sanction inconsistent with the remedies granted explicity by Congress to other agencies mandated to enforce the laws against employment discrimination. Commission consideration of a regulatee's personnel practices and consideration of evidence by an intervenor who believes himself subject to employment discrimination, and action upon a rate filing or license application based in whole or part upon those personnel practices and infractions, would in effect result in potential Commission enforcement of compliance by its regulatees with employment discrimination laws. Commission approval or denial of requests before it are of vital significance to applicants and directly affect their ability to continue proper service to the public. Jurisdiction indirectly to regulate employment practices through the denial or limitation of requests on the basis of personnel practices would therefore be tantamount to the direct regulation determined initially by the court of appeals to be proscribed.

There is no statutory support to justify the Commission's regulation of employment practices of its regulatees. The court of appeals affirmance of the Commission on this ground discussed in detail the pertinent legislation and its history. The Federal Water Power Act,[2] the Federal Power Act,[3] and the

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[2] 41 Stat. 1063 (June 10, 1920), *as amended* 16 U.S.C. §§ 791–823 (1970).

[3] 49 Stat. 803, 838 (Aug. 26, 1935), *as codified* 16 U.S.C. §§ 824–5 (1970).

Natural Gas Act,[4] each refer broadly to the "public interest". Nevertheless, as the court of appeals found, (*supra*, at 6) those references do not refer to all public interests, but to the public interest with respect to the interests the respective statutes were enacted to protect. As the Commission stated, "[a]pplication of public interest concept in the context of any given regulatory statute presupposes inquiry into, and observance of, the legislative purposes of the Act" (Pet. App. at 47a).[5]

The Federal Water Power Act concerns "the public's interest in the optimal use of waterways" with the objectives of exploiting the nation's hydro-electric resources through comprehensive planning to accomplish among other things, the conservation of resources (*id.* at 11a). The Federal Power Act is directed "to guard the [electric] consumer from the exploitation by non-competitive electric power companies" and, "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy" (*id.* at 12a–13a). The Natural Gas Act was also enacted to prevent "the exploitation of the gas consumer" (*id.* at 14a).

The prevention of employment discrimination is not one of the Commission's statutorily defined objectives. The Congress did not entrust the Commission with any responsibility to prevent employment dis-

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[4] 52 Stat. 821 (June 21, 1938), *as codified*, 15 U.S.C. § 717, *et seq.* (1970).

[5] See also, *Alabama Electric Cooperative, Inc.* v. *S.E.C.*, 353 F.2d 905, 907 (C.A. D.C. 1965), *certiorari denied*, 383 U.S. 970.

crimination by its regulatees. Employment discrimination is neither cited in those statutes nor in their legislative histories as a matter which the Commission may consider in carrying out the objectives of those statutes.

The Federal Power Commission's objectives are oriented toward economic regulation for the consumer and natural resource development. They are neither directed to nor concerned with the broad areas of enforcing human civil rights. Employment discrimination, therefore, is not related to the Commission's statutory objectives.

Since Congress did not make the eradication of employment discrimination an object of the Commission's enabling statutes, the Commission has no powers or duties in this area. The Commission can do no more or no less than what Congress has authorized it to do (*F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575). "The broad responsibilities [of the FPC must be executed] within the limitations imposed by pertinent constitutional and statutory commands" *Permian Basin Area Rate Cases*, 390 U.S. 747, 767. This Court has ruled that "public interest" criteria do not empower agency action in areas beyond those related to the jurisdictional context.[6] The existence, therefore, of a public interest criteria for agency action does not mean jurisdiction applies to all the public interest, but only the public interest related to the statutory objectives. Therefore, the contention

[6] *New York Central Securities Co.* v. *U.S.*, 287 U.S. 12, 24; *McClean Trucking Co.* v. *U.S.*, 321 U.S. 67.

(NAACP Pet. 10–11) that, even without a demonstration that some nexus exists between the statutory objectives of civil rights and the Commission's enabling legislation, the "public interest" is to be broadly construed to include significant national concerns is inconsistent with established criteria for statutory interpretation.

A strikingly similar case was recently decided by the Commonwealth Court of Pennsylvania consistent with the Federal Power Commission's position. *NAACP* v. *Pennsylvania Public Utilities Commission,* 5 Pa. Cm. Ct. 312, 290 A. 2d 704, 95 PUR 3d. 451 (Pa. 1972). The NAACP had sought denial of a utility rate increase filed with the Pennsylvania Utilities Commission (PUC) on the grounds of discrimination in employment by the utility. The PUC denied NAACP's petition to intervene in the case. On appeal, the Pennsylvania court affirmed the PUC's decision holding that the PUC has no power to regulate a public utility's employment practices, at least in a rate case, because that power was conferred upon another agency of the state. The court noted the order which NAACP sought was not provided for in the enabling statute and, "that the PUC was not intended to be a super board of directors for the public utility industry forcing upon the regulated companies general concepts of the public interest" 290 A. 2d at 708. The court distinguished the authority of the Public Service Commission of the District of Columbia which by law expressly has authority to compel compliance with *all* laws of the United States.

Southern Steamship Co. v. *N.L.R.B.*, 316 U.S. 31, 47, is cited by NAACP in support of its position that other agencies must promote national policies not set forth in their statutes. In fact, it supports the contrary view. There this Court held the NLRB had acted beyond its powers and abused its discretion where the Board's orders failed to effectuate the policies of the National Labor Relations Act when a violation of the Criminal Code was found by this Court. Significantly, the relief the NLRB had ordered was held to be inconsistent with the policies of the National Labor Relations Act, rather than other national policies expressed in the Criminal Code.

On the other hand, where other public policies "can be related to the objectives of the statute administered by the agency" (*City of Chicago* v. *F.P.C.*, 385 F.2d 629, 635 (C.A.D.C. 1967), *certiorari denied, sub nom, P.U.C. of Wisconsin* v. *F.P.C.*, 390 U.S. 945), they may be considered by an agency in administering its statute. The antitrust laws are an example of legislative areas whose objectives can be related to the objectives of the statutes administered by this Commission. However, where no such nexus exists, the extraneous statutes are not part of any agency's legitimate concerns. The objectives of the statutes in the field of employment discrimination,[7] do not have the logical relation to the objectives of the statutes

[7] Primarily, the Civil Rights Act of 1964, 42 U.S.C. 2000e.

which the Federal Power Commission administers. As pointed out by the Commission's opinion, citing this Court, *Griggs, et al.* v. *Duke Power Company,* 401 U.S. 424, 429–31 (1971), "[t]he objective of Congress in the enactment of Title VII [of the Civil Rights Act of 1964] * * * was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees * * * what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate insidiously to discriminate on the basis of racial or other impermissible classification" (Pet. App. 51a). Furtherance of the objectives of the Civil Rights Act by the Federal Power Commission would, therefore, be in furtherance of objectives beyond its statutory mandate.

The mere possibility that at times a Federal Power Commission decision pursuant to its statutory objectives is also coincidentally consistent with the objectives of civil rights laws (such as prohibiting the passing through to customers of costs for judicially imposed fines for violations of civil rights laws) does not justify agency intrusion into the jurisdictional areas mandated by Congress to be administered by others. Commission rejection of such a cost is not because it is related to employment discrimination but because it is cost resulting from an act adjudged illegal by appropriate authority.

The fact that equal employment by its regulatees

is not a statutorily mandated regulatory objective for the Commission, does not leave these valuable rights without a champion. Congress has decreed an end to employment discrimination and has placed the primary responsibility for fulfilling that mandate in Equal Employment Opportunity Commission. The court of appeals found strong evidence of Congress' specific desire not to diffuse authority over employment discrimination among federal agencies other than EEOC.[8] Whether Congress located the enforcement of equal employment opportunities in the EEOC is for all practical purposes answerable in terms of remedies for alleged violations of equal employment law requirements. Insofar as the Commission regulatees are concerned, Congress left the remedies with the EEOC and other appropriate agencies, because in legislating an end to employment discrimination, Congress did not give to this Commission any more authority than that which it previously possessed.

NAACP cites two cases to support its argument that Title VII of the Civil Rights Act of 1964, does not preclude other agencies from exercising jurisdiction concurrently with the EEOC and that other federal remedies are available for employment dis-

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[8] Pet. App. 21a, citing Section 604 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1970), particularly § 2000d–3 (1970) which states:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

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crimination. The Commission does not contend no remedies other than Title VII are available for employment discrimination, and the Commission's opinion recited several such remedies (Pet. App. 50a, 54a–57a). Rather, the Commission contends that concurrent jurisdiction urged by NAACP has not been given to the Federal Power Commission. In the first case cited by NAACP, *United Packinghouse, Food & Allied Workers International Union* v. *N.L.R.B.*, 416 F. 2d 1126 (C.A.D.C. 1969), *certiorari denied*, 396 U.S. 903, the issue as discussed is not pertinent, because it assumed not only a violation of Title VII, but also a violation of the National Labor Relations Act (416 F. 2d at 1133, note 11). The second case, *Johnson* v. *Railway Express Agency*, 421 U.S. 454, equally, is not pertinent. The relevant holding of that case is no more than that an individual, by Title VII, "is not deprived of other remedies he possesses" or of his rights under, "other applicable state and federal statutes." It does not stand for the proposition NAACP espouses: that rights and remedies against employment discrimination exist in any agency having plenary regulatory authority over an industry.

The fact that the Federal Communications Commission has promulgated rules in the area of equal employment practices [9] is not dispositive and is wholly

[9] The relevant FCC regulations are contained in 47 C.F.R. 21.307; 47 C.F.R. 76.311.

distinguishable from the case at hand. The obligations of the FCC place that agency in a position of control over the broadcasting industry.[10] The Communications Act of 1934, 47 U.S.C. 151, *et seq.*, as amended, gave the FCC the responsibility of guarding against racially discriminatory programming.[11] As the court of appeals correctly noted (Pet. App. 22a), the FCC found that the goal of nondiscrimination in programming would be jeopardized if minorities were systematically excluded from a broadcaster's employ. Such a nexus between the agency's mandate and the regulatee's employment practices is lacking with respect to Federal Power Commission action. In any event, this Court has found the FCC's "public interest" responsibilities do not reach to all areas of national concern.[12]

Other regulatory agencies have considered or have pending before them proceedings concerning the issuance of rules on employment discrimination. One, the Federal Home Loan Bank Board has adopted some rules in the area. The court of appeals discussed these matters in detail (Pet App. 23a–24a) and concluded that these actions of other agencies are either distinguishable or not dispositive here. In 1971, the SEC issued rules relating to civil rights matters which bore

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[10] *Red Lion Broadcast Co.* v. *F.C.C.*, 395 U.S. 367.

[11] *Office of Communications of the United Church of Christ* v. *F.C.C.*, 359 F.2d 994 (C.A.D.C. 1966).

[12] *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 216, 219; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285.

a nexus to its regulatory responsibilities.[13] Later the SEC declined to promulgate rules on employment discrimination because no connection was shown with its regulatory responsibilities.[14] More recently it again decided not to prescribe forms requiring specific employment information.[15]

The Civil Aeronautics Board and the Interstate Commerce Commission have issued Notices of Proposed Rulemaking on this subject,[16] but have not taken any further action and apparently await the outcome of these proceedings.

2. The consequences of the court of appeals' decision also indicate its result is impractical and inappropriate. It imposes a burden upon the Federal Power Commission which would severely impair the ability of the Commission to discharge its statutory responsibilities under the Federal Power Act, 16 U.S.C. 791a, *et seq.* and the Natural Gas Act, 15 U.S.C. 717 *et seq.* The thrust of the decision is to permit the introduction into the Commission's economic regulatory proceedings large masses of materials and evidence which may be unrelated to the questions whether a natural gas applicant is ready willing and able to perform a service and that the proposed utility service is required by the public con-

[13] SEC Securities Act Release No. 5170 & Exchange Act Release No. 9252 (1971).

[14] 39 Fed. Reg. 2809, 2810 (1974). *See also* 37 Fed. Reg. 28, 767 (1967).

[15] Securities Act of 1933 Release No. 5627, Securities Exchange Act of 1934 Release, No. 11733, October 14, 1975.

[16] See 37 Fed. Reg. 15518 (1972), and 36 Fed. Reg. 10741 (1971), respectively.

venience and necessity; or whether proposed hydroelectric project works are necessary or convenient for the development and improvement of navigation or for the development, transmission, or utilization of power related to bodies of water subject to Commission jurisdiction.

The Commission recognizes its responsibility to consider whether costs may appropriately be passed on to consumers and in doing so to consider whether the costs are used and useful in the utility operations of the regulatee for the benefit of the customer and whether they are just and reasonable. Unjust and unreasonable costs are disallowed by the uniform accounting requirements of the Commission.[17] For purposes of disallowing such costs the Commission may investigate background facts. It does so systematically under its accounting procedures. These investigations, however, do not determine what the Commission may adjudicate in terms of legal obligations. In allowing or disallowing costs, the Commission commonly must determine whether they result from prudent management decisions. Typically such an evaluation presents no question of whether the company's action is in conformity with other laws, which the Commission has no authority to administer.

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[17] 18 C.F.R. Parts 101, 104, 201, and 204, Uniform Systems of Accounts for Public Utilities, Licensees and Natural Gas Companies, General Instructions, 2E, which reads: "All amounts inincluded in the accounts prescribed herein for [electric and gas plant] and operating expenses shall be just and reasonable and any payments or accruals by the utility in excess of just and reasonable charges shall be included in account 426.5, Other Deductions."

In regulating economic activity the Commission may on occasion be faced with an intersection of its primary statutory responsibility and other laws governing economic activity. While the Commission does not adjudicate violations of such other laws, it may disallow costs incurred in violation of such laws in the discharge of its own regulatory responsibilities.

Quite a different situation is presented in considering costs caused by alleged violations of the civil rights laws. These are statutes with no obvious nexus to the cost factors which the Commission commonly considers. Accordingly, in evaluating the permissability of costs caused by allegedly discriminatory activity, the Commission could not focus solely on the issue of economic prudency. Rather a two-step analysis would be necessary. The Commission would have to determine as a preliminary matter whether there was a violation of civil rights laws. Then, and only then, could it determine whether costs were incurred which should be disallowed. For example, if a boycott assertedly caused by an employer's discriminatory practices leads to ascertainable costs, the question of how to treat the costs could not be determined by reference to the economic prudency of management's action. Rather, the first question would have to be whether the management action leading to the boycott violated the civil rights laws. Only then could the Commission determine whether to allow the costs.

But Congress has not given the Commission authority independently to adjudicate alleged violations of the civil rights laws. Administratively, the Congress has not engaged the Commission in a duplication of functions by empowering it to undertake its own review and hear evidence on the question of whether amounts are being expended for activities which may be contrary to laws which Congress has not given the Commission authority to administer. Of course, if certain activities are finally adjudicated in the appropriate judicial or administrative forum to be contrary to law, the Commission's Uniform System of Accounts require such amounts to be deducted from income.[18]

In addition, were each regulatory agency, each with unique procedures best suited for resolving particular issues coming before it, required to react to demonstrated employment and discrimination, the likely result would be a myriad of conflicting findings and decisions concerning each individual allegation of employment discrimination.

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[18] 18 CFR Parts 101, 104, 201, and 204, Account 426.3 relates to amounts which are income deductions and reads in full: "Penalties. This account shall include payments by the company for penalties or fines for violations of any regulatory statutes by the company or its officials."

This Commission's hearing procedures are geared to the requirements of rate making and licensing. The introduction on a broad scale into such cases of evidence of individual discrimination, testimony upon motive, employment statistics, individual qualifications, and other areas totally outside the Commission's and staff's expertise, would disrupt the course of those already complex procedures and impair the Commission's ability to meet its duties under the Federal Power Act and the Natural Gas Act. Severance of the employment discrimination issues for separate decision would merely serve to delay the outcome of the proceedings and consequently delay final approval of rate increases or authorization for the construction of needed energy facilities.

This nation is currently facing significant natural gas and fuel shortages. It has long been recognized there is a pressing need for exploration and development of natural gas reserves.[19] If this Court were to allow the insertion into Commission certificate or rate proceedings of issues relating to the appropriate employment practices of producers with large numbers of employees, such as Exxon Corporation, Texaco, Inc., or Mobil Oil Corporation, or the thousands of small producers seeking authority to sell natural gas pursuant to Section 4 or 7 of the Natural Gas Act, it could only interminably delay the outcome of their cases and such delay could only be potentially devastating to both producer and Commission efforts

[19] See, *e.g.*, *Placid Oil Co.* v. *F.P.C.*, 483 F. 2d 880 (C.A. 5 1973).

to reduce the burdens which the natural gas shortage has imposed upon this nation.

The Commission's jurisdiction under the Natural Gas Act extends to approximately 6,200 natural gas producers, of which 82 are large producers each selling by definition more than 10 billion cubic feet per year.[20] These producers filed with the Commission a total of 8,062 rate increases in 108 dockets in fiscal year 1975.[21] Additionally, natural gas producers filed 1,366 certificate and abandonment applications during fiscal year 1975.[22]

Moreover, under the Natural Gas Act, the Commission's regulation of national gas producer rates are no longer accomplished on an individual cost of service basis. Rather, nationwide rate ceilings for wellhead sales have been established and the Commission is not concerned with an individual company's cost of doing business. See *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 282. If the Commission is required to investigate the employment practices of individual producers the potential burden of reviewing them for the several thousand producers individually would be insurmountable. Moreover, individual review would be wholly incompatible with the framework of the nation-wide or area-wide means of regulating producer rates which have been judicially approved and which are a necessary methodology in the Commission's efforts to al-

[20] Total does not include 54 producers affiliated with natural gas pipelines and large producing companies.

[21] FPC 1975 Annual Report to Congress, Appendix B, Table 31.

[22] *Id.*, Appendix B, Table 32.

leviate the nation's critical natural gas supply shortage. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 755–58.

In addition, the Commission has certificate and rate jurisdiction over 123 interstate natural gas pipelines. In fiscal year 1975 they filed 317 rate increase applications [23] and 515 certification applications.[24] A total of 195 pipeline rate cases and 204 pipeline certificate cases were in litigation during fiscal year 1975.[25] The additional burdens of considering evidence of employment discrimination in the litigated cases alone are apparent.

The Commission's rate jurisdiction extends to about 200 public utilities selling electric energy at wholesale in interstate commerce under the Federal Power Act. In fiscal year 1975, 3,382 electric rate filings were received and a total of 249 electric rate cases were involved in formal litigation during that period.[26] Commission jurisdiction also applies to approximately 210 hydro-electric licensees and more than 600 projects under license. About 117 applications concerning their projects were received during fiscal year 1975,[27] and 50 cases were involved in contested proceedings during the period.[28]

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[23] *Id.*, Appendix B, Table 35.

[24] FPC Budget Estimates, Submission of Office of Management and Budget, Fiscal Year 1977, p. 3–54.

[25] *Id.*, at pp. 3–61 and 3–59.

[26] *Id.*, at pp. 3–40, 3–42.

[27] *Id.* at pp. 3–8 to 3–12.

[28] *Id.* at pp. 3–17.

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The Commission's Congressional mandate has neither allowed nor equipped the Commission to deal effectively with national policies other that the development and conversion of natural resources. Most assuredly, it has not equipped the Commission to deal effectively with employment discrimination.

B. THE FIFTH AMENDMENT DOES NOT REQUIRE THAT A FEDERAL AGENCY ACT AFFIRMATIVELY TO PROHIBIT ANY EMPLOYMENT DISCRIMINATION BY COMPANIES REGULATED BY THE AGENCY

The NAACP states that, "[t]he precise constitutional question in this case is whether the Federal Power Commission, as a government agency, has violated its responsibilities under the Fifth Amendment by not requiring the industry over which it exercises far reaching regulatory control to follow nondiscriminatory employment practices" (NAACP Pet. 17). The argument is that, quite apart from questions of "state action", the Constitution requires every governmental body having the power to regulate, to regulate against employment discrimination. It is, as the court of appeals noted, the "truly anomalous" proposition "that the Constitution compels the legislature affirmatively to legislate in a certain way" (Pet. App. 30a). An argument so completely novel requires a careful analysis of its underlying premises.

NAACP's argument starts from the undoubted premise that racial discrimination in employment, if undertaken by the Federal government, denies to persons discriminated against due process of law under

the Fifth Amendment. It is also common ground that the government may become so deeply embroiled in discrimination by a private entity that that discrimination becomes, for constitutional purposes, the action of government. But NAACP's argument goes much further. NAACP argues that a government agency with plenary jurisdiction to regulate in the public interest for the protection of consumers which fails to act affirmatively in eliminating discriminatory hiring practices in regulated companies, by that failure to act, violates the Fifth and Fourteenth Amendments. This argument is sweeping, is truly a monumental departure from the present law, and must be rejected.

Ninety-two years ago, in the *Civil Rights Cases*, 109 U.S. 3, 17–18, this Court declared that:

> "* * * it is proper to state that civil rights, such as are guaranteed by the constitution against State aggression, cannot be impaired by the wrongful actions of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual unsupported by such authority is simply a private wrong or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; and if not sanctioned in some way by the state, or not done under State Authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress * * *. Hence, in all those

> cases where the Constitution seeks to protect the rights of the citizens against discrimination and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy * * * [The remedy] must assume that in the cases provided for, the evil or wrong actually committed rests upon some state law or state authority for its excuse and perpetration."

The Court thus drew the essential distinction between public acts and private acts inherent in the Fourteenth and Fifth Amendments.

Relying upon this distinction, this Court has stated that, "[i]t is clear as it always has been since the *Civil Rights Cases* * * *, that private conduct abridging individuals rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." *Burton* v. *Wilmington Parking Authority, et al.* 365 U.S. 715, 722.

In *Cooper* v. *Aaron,* 358 U.S. 1, 19, this Court required a finding of state assistance through some "arrangement, management, funds or property * * *." That test has been reiterated by this Court as recently as last Term. In *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, this Court has held that actions of a state-regulated privately owned public utility did not become "state actions" because of the regulated status of the utility.

This same essential distinction was stated in *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 173, in which the Court noted:

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in the *Civil Rights Cases, supra,* and adhered to in subsequent decisions.

We will show hereafter (*infra.* 38–39) that the actions of the Commission's regulatees do not constitute state action. Recognizing this, NAACP declares that, "[t]he issue is not whether the government involvement in the activities of private companies is sufficient to constitute state action * * *" (NAACP Pet. 17). NAACP goes further and argues that "[t]he precise Constitutional question is whether the Federal Power Commission, as a governmental agency, has violated its responsibilities under the Fifth Amendment by not requiring the industry over which it exercises far reaching regulatory control to follow nondiscriminatory employment practices" (*ibid.*).

The cases cited by NAACP do not support its novel theory. *Green* v. *Kennedy,* 309 F. Supp. 1127

(D.D.C. 1970), *affirmed sub nom., Coit* v. *Green,* 404 U.S. 997, cited by the NAACP (NAACP Pet. 18), does not speak to the issue here presented. In *Green,* the Secretary of the Treasury was enjoined from granting tax exempt status to private, segregated schools in Mississippi. This action was based upon a finding by the district court, "* * * that segregated private schools [have] been established in Mississippi for the purpose of avoiding the result of a unitary, non-racial public school system required by the Federal court decisions outlawing segregation in public schools and in an attempt to maintain a broad pattern of racial segregation in the school system" (309 F. Supp. at 1134).

Further, the Court found: "* * * on the evidence presented on the motion, that the tax benefits under the Internal Revenue Code mean a substantial and significant support by the Government to the segregated private school pattern" (*ibid.*). The Court concluded: "[t]here is substantial support for the conclusions that the validity of tax exemption and deductibility of contributions are to be determined on the basis of (1) their practical tendency to increase the incidence of private discrimination, and (2) whether the discrimination so augmented frustrates the exercise of fundamental liberties" (*id.* at 1136). In other words, the Court found a Fifth Amendment duty arising from the measurable relationship between government aid and the frustration of fundamental liberties.

Throughout the Court's opinion in *Green,* it is emphasized that the tax benefits operate as government support for the segregation. The Court states, "[t]he Federal Government is not constitutionally free to frustrate the only constitutionally permissible state policy, of a unitary school system, by providing government support for endeavors to continue under private auspices the kind of racially segregated dual school system that the state formerly supported [through state tuition grants]" (*id.* at 1137).

Green v. *Kennedy* basically is a "state action" case. The Government activity complained of operates to support the denial of equal protection. NAACP's reliance on *Green* v. *Kennedy* to support its argument that state action is not a necessary ingredient of constitutional duties is therefore misplaced.

The NAACP argument ignores the traditional test for determining whether private acts are to be deemed state actions. Such a departure from the present state law is unwarranted and unwise.

If accepted, the doctrine advanced by NAACP would have consequences far beyond the field of employment discrimination. If agencies are charged with a constitutional duty to assure that there is no denial of due process of law in any area of each of its regulatee's activities, the entire panoply of rules for the enforcement of due process and equal protection will be placed upon the shoulders of each agency for separate enforcement. Indeed, Congress would be constitutionally prohibited from centralizing the enforcement

of rights in a single authority, as it has attempted to do with the EEOC. Moreover, private, albeit regulated, entities would be required to insure not only equal employment opportunity but procedural and substantive due process in all areas of their operations. Before agencies would be free to act in their particular statutory sphere of expertise, agencies would have to consider all such claims raised against their regulatees and to weigh the merits of those claims even and most often in areas totally unrelated to their expertise.

If the NAACP's argument were to be accepted by the Court, there need be no causal interrelation between an agency's substantial regulatory involvement and its constitutional duties. Any amount of regulatory authority over a company would require the regulatee to operate in accord with the Fifth Amendment. Using the analogy of Mr. Justice Douglas' dissenting opinion in *Moose Lodge* v. *Irvis, supra,* NAACP's argument requires that "the grant to a householder of a permit to operate an incinerator puts the householder in the public domain," [29] and mandates that his actions comply with the duties imposed on the federal and state governments by the Fifth and Fourteenth Amendments.

The argument NAACP would have this Court adopt is completely without precedent, flies in the face of the recognized distinction between public and private acts noted in the *Civil Rights Cases, supra,* is com-

[29] 407 U.S. at 180.

pletely inconsistent with the "state action" doctrine, and admits of no limitations upon its scope.

There remains only the question whether the Federal Power Commission is involved with the activities of its regulatees to a degree sufficient to constitute "state action". We note that NAACP does not ask this Court to determine whether the action of the Commission's regulatees is "state action" (NAACP Pet. 17). Nevertheless, since state action is the only peg upon which a constitutional duty could hang, it is appropriate to dispose of that issue here.

The state action issue, as it applies to the Commission's regulatees, was decided by this Court only last term in *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345. The statutory powers of the Federal Power Commission, described in the opinion below, (Pet. App. 10a–15a), are quite similar to those exercised by the Pennsylvania Public Utility Commission over Metropolitan Edison Company as set forth in *Jackson.* In *Jackson,* the Court stated (419 U.S. at 350–351): "It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of

the State itself."[30] In this case, as in *Jackson*, the fact of regulation cannot turn private discrimination into state action. There is not a "sufficiently close nexus" between that regulation and the alleged discrimination; nor has the government "so far insinuated itself into a position of interdependence"[31] with the regulatee.[32]

Once perceived in its fullness, the NAACP's argument, that the Constitution by its own force requires every Federal agency to require every regulatee to ensure the constitutional rights of its employees, must be rejected. It eviscerates the distinction between state acts and private acts inherent in both the Fifth and Fourteenth Amendments. Furthermore, it is totally without any rational boundaries.

In sum, the Fifth Amendment does not require a federal agency to act affirmatively to prohibit denial of due process of law by regulated companies.

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[30] 419 U.S. at 350–51.

[31] *Burton* v. *Wilmington Parking Authority, et al.*, 365 U.S. 715, 725 (1960).

[32] NAACP also cites certain cases involving Hill-Burton Act assistance to private hospitals. These cases are inapposite to this proceeding. *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (C.A. 4 1963) *certiorari denied* 376 U.S. 938 (1964); *Sams* v. *Ohio Valley Hospital Ass'n.*, 413 F. 2d 826 (C.A. 4 1969); and *Ward* v. *St. Anthony Hospital*, 476 F. 2d 671 (C.A. 10 1973), involves hospitals receiving direct federal assistance. These cases do not speak to the "fostering" argument advanced by NAACP.

II

IF LIMITED JURISDICTION TO CONSIDER EMPLOYMENT DISCRIMINATION EXISTS WITH THE FEDERAL POWER COMMISSION, IT IS NOT REQUIRED TO ISSUE RULES TO PREVENT EMPLOYMENT DISCRIMINATION

NAACP argues that once jurisdiction is determined to exist, even the so-called limited jurisdiction, the Federal Power Commission has a duty to act affirmatively to prevent employment discrimination and must, therefore, issue rules (NAACP Pet. 14–16). It argues that the court of appeals erred in finding that the Commission's authority to issue rules is discretionary.

Contrary to NAACP's contention, the Constitution does not require the issuance of administrative rules in all areas of Civil Rights or any other area protected by the Constitution; nor would the existence of general statutory authority under the Natural Gas Act or the Federal Power Act over employment discrimination require the Commission to issue rules requested by NAACP. Those statutes provide discretionary authority in Sections 16 and 309,[33] respectively, to issue appropriate rules and regulations found desirable in carrying out their statutory purposes.

NAACP cite no cases for its novel proposition. On the other hand, strong precedent exists to support the court of appeals' holding. This Court has stated that

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[33] 15 U.S.C. 717o and 16 U.S.C. 825h, respectively.

a rigid requirement that rules be promulgated (*S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 202–203):

> would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. See Report of the Attorney General's Committee on Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess., p. 29. Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
>
> In other words, problems may arise in a case which the administrative agency could not reasonably foresee problems which must be solved despite the absence of a relevant general rule. Or the agency may not have sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on

> a case-to-case basis if the administrative process is to be effective. There is, thus, a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency. See *Columbia Broadcasting System* v. *United States,* 316 U.S. 407, 421.
>
> Hence we refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct. Cf. *Federal Trade Commission* v. *Keppel & Bro.,* 291 U.S. 304.

Repeating its basic argument, NAACP suggests a nexus exists between the cost of practicing employment discrimination and the Commission's duty to see no illegitimate costs are passed on to consumers. As we have pointed out *supra,* the basic argument is answered by the Commission's lack of legislative authority to regulate utility employment practices. The Commission's duty to assure the efficient performance of an industry does not translate into the authority to assure there is no employment discrimination. NAACP's argument assumes that practicing employment discrimination by a regulatee will necessarily result in an inadequacy of service or higher prices. This has not been demonstrated. That a nexus may coincidentally exist in certain cases would neither dictate nor justify a rule of general applicability.

CONCLUSION

For the reasons stated, insofar as it set aside Opinion Nos. 623 and 623–A of the Federal Power Commission, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1619

FEDERAL POWER COMMISSION,

Petitioner,

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

No. 74-1608

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Cross Petitioner

v.

FEDERAL POWER COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

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CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

QUESTIONS PRESENTED 3

STATEMENT 4

SUMMARY OF ARGUMENT 12

ARGUMENT 16

I. DISCRIMINATION IN EMPLOYMENT BY NATURAL GAS AND ELECTRIC POWER UTILITIES IS RELEVANT TO THE REGULATORY DUTIES OF THE FEDERAL POWER COMMISSION UNDER THE FEDERAL POWER ACT AND THE NATURAL GAS ACT. 16

A. The Federal Power Commission's Responsibility Requires it to Consider National Policies Affected by Its Actions Including Those not Expressly Listed in its Enabling Statutes. 16

B. Employment Discrimination Has a Direct Bearing on the Federal Power Commission's Regulatory Activities. 20

1. Consumer Protection from Undue Costs 20

2. Financial Condition of the Industry 30

3. Fitness and Qualifications of Licensees 31

Page

C. The Laws Establishing Equal Employment Policy Do Not Vest Exclusive Jurisdiction in Any One Agency and In No Way Foreclose the FPC from Assisting in Eliminating Job Discrimination by Utilities 34

II. IT WILL NOT IMPOSE AN UNDUE BURDEN ON THE FEDERAL POWER COMMISSION TO TAKE COGNIZANCE OF DISCRIMINATION BY ITS REGULATEES 38

III. WHILE THE FPC HAS BROAD DISCRETION IN DECIDING TO PROCEED BY RULEMAKING OR ADJUDICATION IT MUST AT LEAST ESTABLISH AND ANNOUNCE A POLICY AGAINST EMPLOYMENT DISCRIMINATION BY ITS REGULATEES AND PRESCRIBE THE MINIMAL STEPS FOR IMPLEMENTING THAT POLICY. 44

IV. THE FPC'S FAILURE TO RESPOND TO THE UNLAWFUL EMPLOYMENT PRACTICES OF ITS REGULATEES RAISES SERIOUS CONSTITUTIONAL QUESTIONS. 49

A. Where Protection is Sought Against Racial Discrimination and the Conduct of a Government Agency is at Issue, the Test of State Action is Less Onerous Than in Other Cases. . 50

B. The FPC's Involvement With Private Utilities Facilities, Reinforces and Supports Discrimination 56

CONCLUSION 61

INDEX TO CITATIONS

Page

Cases:

Alabama Power Co. v. FPC, 511 F.2d 383 (D.C. Cir. 1974) 14, 33, 43

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) ... 19, 20

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 18

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 49

Atlantic Refining Co. v. FPC, 360 U.S. 378 (1959) ..12, 16, 32, 40

Bolling v. Sharpe, 347 U.S. 497 (1954) 50

Boynton v. Virginia, 364 U.S. 454 (1960) 29

Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970), aff'd, 445 F.2d 412 (7th Cir. 1971) 51

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 52

City of Chicago v. FPC, 385 F.2d 629 (D.C. Cir. 1967), cert. denied, 390 U.S. 945 (1968) 16, 33

City of Pittsburgh v. FPC, 237 F.2d 741 (D.C. Cir. 1956) .. 16, 18

Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970) 52

Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U.S. 714 (1963) 29

Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971) 25

Page

Cooper v. Aaron, 358 U.S. 1 (1958) 53

Cornelius v. Benevolent Protective Order of Elks, 382 F. Supp. 1182 (D. Conn. 1974) 55

Dandridge v. Williams, 397 U.S. 471 (1970) 49

Denver & R.G. W. R.R. v. United States, 387 U.S. 485 (1967) 17

EEOC v. AT & T, 365 F. Supp. 1105 (E.D. Pa. 1973), aff'd, 506 F.2d 735 (3d Cir. 1974) 23

Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967) 56

FCC v. American Broadcasting Co., 347 U.S. 284 (1954) .. 31, 33

FMC v. Svenska Amerika Linien, 390 U.S. 238 (1968) 17

FPC v. Idaho Power Co., 344 U.S. 17 (1952) 40

FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942) 40

FPC v. Transcontinental Gas Corp., 365 U.S. 1 (1961) 16, 33

Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), aff'd sub nom., Coit v. Green, 404 U.S. 997 (1971) 55

Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970), appeal dismissed, 398 U.S. 956 (1970), 400 U.S. 986 (1971) 56

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 5, 18

Gulf States Utilities Co. v. FPC, 411 U.S. 747 (1973) 12, 17

Hunter v. Erickson, 393 U.S. 385 (1969) 59

Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974) 53, 54, 55, 58

Page

Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974), cert. denied, 420 U.S. 927 (1975) 50, 53

Jersey Central Power & Light Co. v. Local 327 I.B.E.W., 508 F.2d 687 (3d Cir. 1975) 5

Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) 22

Johnson v. Railway Express Agency, 421 U.S. 454 (1975) 19, 21, 35

Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971) 59

Lombard v. Louisiana, 373 U.S. 267 (1963) 55

McCabe v. A., T. U S.F. Ry. Co., 235 U.S. 151 (1914) 55

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 18

McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972) 56

Mitchell v. United States, 313 U.S. 80 (1941) 29

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) ... 53, 54, 55

Morton v. Ruiz, 415 U.S. 199 (1974) 48

National Coal Ass'n v. FPC, 191 F.2d 462 (D.C. Cir. 1951) 18, 33

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 18

NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 48

NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) 46

Norwood v. Harrison, 413 U.S. 455 (1973) 52, 55, 56

Page

Office of Communications of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) 18, 42

Oregon v. Mitchell, 400 U.S. 112 (1970) 51

Pacific Gas and Electric Company, 44 FPC 1365 (1970) ... 47, 59

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 40

Peterson v. Greenville, 373 U.S. 244 (1963) 55

Public Utilities Commission v. Pollak, 343 U.S. 451 (1952) 60

Reitman v. Mulkey, 387 U.S. 369 (1967) 55

SEC v. Chenery Corp., 332 U.S. 194 (1947) 48

Southern Steamship Co. v. NLRB, 316 U.S. 31 (1942) 17

Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973), modified sub. nom., EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975) 6, 30

Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944) 19

Sugarman v. Dougall, 413 U.S. 634 (1973) 52

Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955) 19

Turner v. City of Memphis, 369 U.S. 350 (1962) 55

Udall v. FPC, 387 U.S. 428 (1967) 12, 17, 32

United Packinghouse, Food & Allied Workers, Int'l. v. NLRB, 416 F.2d 1126 (D.C. Cir.), cert. denied, 396 U.S. 903 (1969) 19, 25

United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) 22

Page

United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973) 6, 21

United States v. Mississippi Power & Light Co., 10 FEP Cases 1084 (S.D. Miss. 1975) 25, 33, 34

United States v. New Orleans Public Services, Inc., 8 FEP Cases 1089 (E.D. La. 1974) 33

United States v. Philadelphia Electric Co., 351 F. Supp. 1394 (E.D. Pa. 1972) 6

United States v. Virginia Electric & Power Co., 327 F. Supp. 1034 (E.D. Va. 1971) 6

Vaca v. Sipes, 386 U.S. 171 (1967) 19

Virginia Electric Power Co., 46 FPC 299 (1971) 27, 47

Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248 (4th Cir. 1971) 53, 60

Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972) 52

Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975) 51

Statutes:

Administrative Procedure Act, 5 U.S.C. §551 et seq. 48

Civil Rights Act of 1866, 42 U.S.C. §1981 ..... 19, 22

Civil Rights Act of 1964
Title VI, 42 U.S.C. §2000d 35, 37, 40
Title VII, Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. §20003 et seq. ___ passim .....

Page

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42 U.S.C. §2000e-14 ... 36

Federal Power Act, 49 Stat. 803, 838, 16 U.S.C. §824-25
Section 205(a), 16 U.S.C. §824d(a) ... 29
Section 206(a), 16 U.S.C. §824e(a) ... 29

Federal Water Power Act, 41 Stat. 1063 et seq., 16 U.S.C. §791a et seq.
Section 4(e), 16 U.S.C. §797(e) ... 58
Section 10(a), 16 U.S.C. §803(a) ... 32
Section 21, 16 U.S.C. §814 ... 58

Freedom of Information Act, 5 U.S.C. §552(a) ... 47

Natural Gas Act, 52 Stat. 821 et seq., 15 U.S.C. §717 et seq.
Section 5(a), 15 U.S.C. §717d(a) ... 29
Section 7, 15 U.S.C. §717f ... 32
Section 7(h), 15 U.S.C. §717f(h) ... 58

Executive and Regulatory Materials:

Executive Order 11,246, as amended, 3 C.F.R. 169 ... 19, 33

Regulation, Federal Communications Commission
47 C.F.R. §21.307 ... 4, 19, 39

Regulation, Federal Home Loan Bank Board
12 C.F.R. §528.7 ... 19

Regulation, Federal Power Commission
18 C.F.R. §1.7(b) ... 4, 39
18 C.F.R. Parts 101 et seq. ... 28

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G. Becker, The Economics of Discrimination (1971) ... 12

Page

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Page

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U.S. Commission on Civil Rights, I Federal Civil Rights Enforcement Effort-1974 (1974). 60

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IN THE

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OCTOBER TERM, 1975

No. 74-1619

FEDERAL POWER COMMISSION,

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NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

No. 74-1608

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*

OPINIONS BELOW

The opinion by the Court of Appeals (Cr. Pet. App. D)* is reported at 520 F.2d 432. The opinions and orders of the Federal Power Commission are found in 48 FPC 40 (Cr. Pet. App. B) and 48 FPC 371 (Cr. Pet. App. C).

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*"Cr. Pet." refers to the petition for certiorari in 74-1608.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The judgment of the United States Court of Appeals for the District of Columbia Circuit (Cr. Pet. App. E) was entered on February 5, 1975. Both parties received an extension of time up to and including June 20, 1975 for the purpose of filing a petition and cross petition for certiorari by orders dated May 2 and May 8, 1975. Cross petitioners in 74-1608 and petitioners in 74-1619 each filed on June 20, 1975. This Court granted both petitions on October 14, 1975 and consolidated the cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

U.S. CONST. amend. XIV, §1

> . . . . ; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL POWER ACT
16 U.S.C. 791a *et seq.*

Sections 4(e), 201(a), 205, 206 and 309 are set out in Cr. Pet. App. A.

NATURAL GAS ACT
15 U.S.C. 717 *et seq.*

Sections 1(a), 4(a)–4(e), 5(a), 5(b), 7(a), 7(c) and 7(e) are set out in Cr. Pet. App. A.

QUESTIONS PRESENTED

By the Federal Power Commission in 74-1619:

1. Whether the Federal Power Commission correctly determined it has no authority to consider coincidentally to the performance of its regulatory functions under the Federal Power Act, 16 U.S.C. 791a, *et seq.* and the Natural Gas Act, 15 U.S.C. 717, *et seq.* evidence that a regulatee is a demonstrated discriminator in its employment relations.

By NAACP et al. in 74-1608:

1. Whether the Federal Power Commission, pursuant to its mandate to regulate in the "public interest," has both statutory authority and responsibility broadly to proscribe employment discrimination in the industries it regulates.

2. Whether, having found that the Federal Power Commission had jurisdiction over employment discrimination for the limited purpose of protecting consumers from illegitimate costs, the court below erred in refusing to require the agency to adopt rules to effectuate its jurisdiction.

3. Whether the Federal Power Commission, by reason of its extensive involvement in the regulation of the gas and electric utility industries, has a Constitutional duty to proscribe employment discrimination by the companies it regulates.

STATEMENT

A. Proceedings Before the Federal Power Commission

In response to evidence of widespread employment discrimination by the gas and electric utility industry, respondents,** a group of civil rights, public interest and employee organizations,[1] petitioned the Federal Power Commission on June 22, 1972 to hold rulemaking proceedings with respect to discrimination by its regulatees (J.A. 3-53). The petition, filed under subsection (b) of section 1.7 of the Commission's Rules of Practice and Procedures, 18 C.F.R. §1.7(b), included as required by that subsection a proposed rule (J.A. 42-48), which was modeled on rules enacted by or proposed to other agencies such as the Federal Communications Commission. See 47 C.F.R. §21.307.

The petition filed with the FPC alleged the existence of substantial and widespread discrimination in the gas and electric utility industry—an industry which in 1970 provided 634,000 jobs. (J.A. 4, 11). Citing statistics compiled by the Equal Employment Opportunity Commission, the petition summarized the position of minorities

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**NAACP *et al.* are referred to throughout as "respondents" rather than cross petitioners and respondents.

[1] The groups included: The National Association for the Advancement of Colored People, The National Urban League, The Mexican American Legal Defense and Educational Fund, The National Organization for Women, The Women's Equity Action League, The League of United Latin American Citizens (in California), The Association for the Betterment of Black Edison Employees, The Office of Communications of the United Church of Christ, The Center for Community Change, The American G.I. Forum (in California), The Mexican American Political Association and United Native Americans, Inc.

and women in the gas and electric industry (J.A. 19-20): (1) The black participation rate in this industry is the lowest (6.1%) among the twenty-three industries reporting employment of 500,000 or more; (2) One-third of all utility establishments filing EEO-1 reports with the EEOC in 1970 had no black employees. In only three of twenty large SMSAs (standard metropolitan statistical areas) did the black participation rate in utilities approach or exceed the participation rate for all industries in the area. In eight of the same twenty SMSAs, the all-industry black participation rate was at least double the black participation rate in local utilities; (3) In 1970, Spanish Surnamed Americans held 3.6 percent of all jobs reported in the EEO-1 nationwide survey, but only 1.6 percent of all jobs in the utilities industry. Spanish Surnamed Americans held less than 1 percent of the official, managerial, professional and sales jobs and only 1.5 percent of all technicians jobs; (4) In many SMSAs Spanish Surnamed Americans have relatively low participation rates in the utilities industry when compared to their participation rate in all industries in the local labor market. For example, in the city of Chicago Spanish Surnamed Americans held 0.4 percent of the jobs in the gas and electric utilities at the same time that they held approximately 5 percent of all jobs in the Chicago area; (5) While women held 34 percent of the positions reported in EEOC's overall survey in 1970, only 15 percent of this industry's employees were female. Nine of every ten females employed in the industry were clerical workers. Less than 2 percent of the blue collar jobs were held by women.

Further, the petition noted the large number of pending or decided cases alleging discrimination in gas and utility companies (J.A. 20-22).[2]

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[2] That petition included a compilation of 75 cases. *See also, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Jersey Central Power*

[footnote continued]

Respondents argued that ample evidence existed to permit the FPC to take action under its authorizing statutes which require the Commission to safeguard the public interest by regulating the interstate wholesale transportation, transmission and sale of electric energy and natural gas (J.A. 24-26). In performing its duties, the Commission, *inter alia*, grants certificates of public convenience and necessity to companies which transport or sell natural gas or who undertake construction, licenses hydroelectric plants, scrutinizes mergers, authorizes sales or abandonment of facilities and regulates the rates for gas and electricity in interstate commerce (J.A. 24-26). Respondents argued that, there being a national policy against employment discrimination, the FPC should consider such a fundamental policy in its determination of what is in the "public interest" (J.A. 23-24). They claimed, moreover, that the Constitution requires such consideration, lest the Federal government become a partner to private discriminatory actions (J.A. 3-37). Accordingly, they called upon the FPC to initiate rulemaking proceedings to prohibit employment discrimination. Specifically, they prayed that the Commission (J.A.

[footnote continued from preceding page]

& Light Co. v. Local 327, I.B.E.W., 508 F.2d 687 (3d Cir 1975); *Rosen v. Public Service Elec. Co.*, 477 F.2d 90 (3d Cir. 1973); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *Georgia Power Co. v. EEOC*, 412 F.2d 462 (5th Cir. 1969); *Jenkins United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973). *modified sub nom., EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *United States v. Philadelphia Elec. Co.*, 351 F. Supp. 1394 (E.D. Pa. 1972); *Phillips v. Columbia Gas of West Virginia, Inc.*, 347 F. Supp. 533 (S.D. W.Va. 1972), *aff'd*, 474 F.2d 1342 (4th Cir. 1973); *United States v. Virginia Electric & Power Co.*, 327 F. Supp. 1034 (E.D. Va. 1971); *Moreman v. Georgia Power Co.*, 310 F. Supp. 327 (N.D. Ga. 1969); *Clark v. Georgia Power Co.*, 310 F. Supp. 538 (N.D. Ga. 1969).

5-6): (1) Prescribe regulations prohibiting discrimination on account of race, color, religion, sex and national origin and assuring equal opportunity in the employment practices of its regulatees; (2) Set public hearings and permit oral argument on such proposed rule; (3) Initiate a notice and comment rulemaking proceeding with respect to such proposed rule; and (4) Grant such other relief as it deemed necessary.

On July 11, 1972, acting with unusual alacrity, the FPC dismissed the petition for rulemaking (J.A. 54-75). The Commission concluded that it lacked delegated statutory authority to regulate discriminatory practices by its regulatees and that neither general executive authority nor constitutional considerations provided a basis for such jurisdiction (J.A. 55-56). According to the Commission, to ascertain its jurisdiction under its public interest powers, it had to rely exclusively on the legislative history of the Federal Power Act and the Natural Gas Act, which it concluded to be the "economic regulation of entrepreneurs engaged in resource developments" (J.A. 59). The Commission did not find the necessary nexus between employment and economic activities to justify the exercise of jurisdiction (J.A. 59 and 61).

The Commission's opinion distinguished employment discrimination from other subjects such as national defense, antitrust, environmental requirements, navigation, flood control or recreation, all of which are "reflected" in the Natural Gas and Federal Power Acts (J.A. 59). Taking jurisdiction would, in the opinion of the Commission, justify regulating "the securities, the taxes, the patents, the safety, the wages and hours, the advertising" of utilities (J.A. 61).

Although respondents referred to federal and state legislative and executive enactments outlawing employment

discrimination as evidence of the national policy against such discrimination (J.A. 23-24), the Commission interpreted the petition as arguing that such legislation conferred enforcement obligations on the Commission (J.A. 61-64). In reviewing the laws and regulations in this area, the Commission did not find that any of these statutes conferred jurisdiction on it (J.A. 61-67). On the contrary, it found the authority of other agencies "exclusive" (J.A. 74).

Finally, the Commission denied that its failure to regulate employment constituted federal support for discrimination (J.A. 68). The Commission emphasized its support for the principle of nondiscrimination and said that it would give such duties highest priority if they were assigned to it (J.A. 72).

On August 8, 1972, respondents petitioned the FPC for a rehearing (J.A. 83-89). Attached to the petition for rehearing was a letter from William H. Brown, III, then Chairman of the Equal Employment Opportunity Commission, dated July 13, 1972, to John N. Nassikas, then Chairman of the Federal Power Commission, supporting the petition for rulemaking and requesting an opportunity to participate in any formal proceedings arising out of the petition (J.A. 87-89). Chairman Brown stressed the pervasiveness of discrimination in the gas and electric utility industry, called attention to hearings on the problem conducted by the EEOC,[3] noted that the House Judiciary Committee had held similar hearings[4] and reminded the

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[3] *See* U.S. Equal Employment Opportunity Commission, *Promise v. Performance* (1972).

[4] *See Hearings Before the Civil Rights Oversight Subcommittee of the House Comm. on the Judiciary*, "Responsibilities of the Federal Power Commission in the Area of Civil Rights," 92d Cong., 2d Sess. (1972) [*Hearings*].

FPC that the United States Department of Justice,[5] the United States Commission on Civil Rights,[6] as well as the EEOC, had expressed the view that the FPC should undertake regulation of the employment practices of the regulated utilities industry (J.A. 87-88). Chairman Brown concluded (J.A. 89):

> The major public policy considerations which are involved in equal employment opportunity require that all segments of the Federal Government responsible for insuring the public interest act to eliminate the undesirable effects of employment discrimination. The Commission would look forward to cooperating with the FPC in this vital area and would be glad to provide whatever assistance you may feel necessary in the development of an equal employment opportunity program for the utilities industry.

On August 21, 1972, the FPC denied the petition for rehearing (J.A. 90-91).

B. Proceedings Before the Court of Appeals.

Respondents obtained review before the United States Court of Appeals for the District of Columbia.[7] On

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[5] *See* J.A. 27-32.

[6] *See* U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort 361 (1970).

[7] The Equal Employment Opportunity Commission filed a brief *amicus curiae* in support of respondents' argument that FPC has both the authority and duty to consider evidence of widespread discriminatory employment practices by its regulatees. *See generally* Brief for EEOC as Amicus Curiae, NAACP *et. al.* v. Federal Power Commission, 520 F.2d 432 (D.C. Cir. 1975).

February 5, 1975, that court issued an opinion and judgment vacating the order of the Federal Power Commission and remanding the case for further proceedings (Cr. Pet. App. D).

The Court of Appeals gave a narrow interpretation to the "public interest" mandate of the FPC. It concluded that "Congress has not charged the Commission with advancing *all* public interests, but only the public's interest in having the particular mandates of the Commission carried out, its interest, in other words, in the conservation of natural resources and the enjoyment of cheap and plentiful electricity and natural gas" (court's emphasis) (Cr. Pet. App. D at 19). The court also concluded that Congress had "centralized responsibility for [employment discrimination] in the Equal Employment Opportunity Commission" (Cr. Pet. App. D at 21). Accordingly, the court ruled that Congress did not intend "for the Commission to entertain and to adjudicate individual complaints of employment discrimination by its regulatees, and to impose sanctions unrelated to the performance of its central regulatory purposes" (Cr. Pet. App D. at 24-25).

At the same time, the court recognized that there were circumstances in which the discriminatory practices of a regulatee were related to the FPC's objectives. The court indicated that a regulatee's discriminatory employment practices could reasonably be related to the pursuit of the Commission's statutory objectives and could appropriately provide the occasion for its issuance of rules (Cr. Pet. App. D. at 25). The court elaborated on its reasoning (Cr. Pet. App. D. at 25-26):

> The Commission's task in protecting the consumer against exploitation can be alternatively described as the task of seeing that no

> unnecessary or illegitimate costs are passed along to that consumer. Costs incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility. Without attempting an exhaustive enumeration of such costs, we identify at least the following as indicative of those arguably within the Commission's range of concern: (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proved that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination, (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion.

Although the court suggested some areas in which rulemaking would be appropriate, it did not require the Commission to adopt rules related to employment discrimination, but left this question to the discretion of the Commission (Cr. Pet. App. D at 31-33). The Court, in addition, did not address itself with any certainty to respondents' constitutional arguments. Contrary to the statement of petitioner (Pet. Br. at 8), the court did not find that the Commission had no constitutional obligation to impose nondiscrimination requirements on its regulatees. Rather, it expressed a doubt as to whether the Commission

had to undertake this obligation affirmatively (Cr. Pet. App. D at 31), stated that the agency was not constitutionally required to adopt a rule of the breadth proposed by respondents and left the question for future resolution if necessary (*id.* at 32). In remanding the case for further proceedings, the court made clear that the FPC could not deny respondents' request on grounds that the agency had no authority to promulgate rules relating to employment discrimination (Cr. Pet. App. D at 32) and suggested, but did not hold, that the FPC might validly temporarily defer rulemaking in favor of a case-by-case approach until it gained further experience in dealing with employment discrimination (*id.* at 33).

SUMMARY OF ARGUMENT

The court below was correct in holding that discrimination in employment by regulated utilities is relevant to the duties of the Federal Power Commission under the Federal Power Act and the Natural Gas Act and thus may not be ignored by the Commission. This Court has consistently interpreted those statutes as embracing all important aspects of national policy that may be affected by the FPC's actions or that are related to its basic purposes. *Atlantic Refining Co. v. FPC, Gulf States Utilities Co. v. FPC, Udall v. FPC.*

The mandate of equal employment opportunity for all citizens is a paramount national policy that has a direct bearing on and relationship to the duties of the Commission. When the Commission closes its eyes to job discrimination by the companies it regulates, it abdicates its responsibility to safeguard consumers against undue costs being included in their rates. These costs of employment discrimination are real and substantial: they include back pay awards, the potential magnitude of which can be

gauged by the extremely large sums already assessed in litigation against utilities and other companies; potential monetary liabilities in the form of prospective wage relief and attorneys' fees; losses in productivity and efficiency that result from arbitrary exclusion of an important segment of the workforce (which the Council of Economic Advisors and others have estimated at $20 billion yearly for all industries); and further losses in productivity stemming from the demoralizing effects of discrimination on employees. In a related context, the interest of the government in averting such costs to the nation has been held sufficient to justify action to prevent job discrimination on federally assisted construction contracts, even absent specific statutory authorization.

Commission authority to consider the undue costs and adverse effects of discrimination must go beyond the ratemaking context, for if it were so confined the agency would face unacceptable alternatives: either to let ratepayers absorb the costs of job bias, contrary to the statute, or to impose such costs on the utility and its shareholders, which could impair the company's financial health. The agency can best deal with this problem by taking basic preventive steps, such as the use of its ample authority to attach appropriate conditions to licenses and certificates of public convenience and necessity, in order to assure that recipients will act legally and in conformity with the public interest.

The FPC does not appear to contest the existence of a statutory duty to prevent undue costs from being passed on to consumers; it would be hard put to do since its enabling statute requires that it examine and alter unjust or unduly discriminatory practices that affect utility rates. Nor can the agency argue effectively that dealing with job discrimination is the exclusive province of the Equal

Employment Opportunity Commission. The legislative history of Title VII specifically repudiates any notion that Congress intended to vest enforcement authority solely in the EEOC. And practical experience has demonstrated that implementation of the national policy against job discrimination works best and most efficiently when the EEOC is able to enlist the support and cooperation of other federal agencies, as it has sought to do in the case of the FPC.

Rather, the FPC appears to rest its defense almost entirely on the non-jurisdictional contention that assumption of its duty to deal with job discrimination by utilities would impose an undue administrative burden. But the apprehensions it voices are both unsupported and unjustified. An agency called upon to play a supportive role in the implementation of national policy can carry out its responsibility through a variety of mechanisms—obtaining basic information and statistics to monitor the industry, availing itself of the expertise of the primary agency and making its own expertise available to the primary agency, and attaching appropriate conditions to licenses and contracts, to mention just a few. The courts have endorsed such pragmatic approaches by the FPC in a similar context. *Alabama Power Co. v. FPC.* And the experience of the Federal Communications Commission in dealing with job discrimination by its regulatees demonstrates concretely that the duty can be handled successfully without deflecting the agency from its primary tasks.

Accordingly, the reasoning of the court below was sound and its decision correct. It erred in only two respects: (1) in unduly restricting the discretion of the FPC to select the best means of implementing its duty by

holding that certain methods of implementation were "beyond the Commission's power;" and (2) by failing to require the FPC to issue a rule articulating, at a minimum, its basic policy against discrimination and the general procedures it will employ to implement that policy. As to the first point, we simply contend that the court's ruling was premature, because it should be left to the agency in the first instance to determine the necessary and appropriate contours of the specific regulations to be enacted. The latter requirement would hardly interfere with the FPC's discretion in determining how best to proceed; it would simply conform with basic precepts of fair notice embraced in the Administrative Procedure Act, particularly needed when an agency is reversing past policies that have broad impact on the public.

If this Court should differ with the court below on the issue of statutory responsibility, it would be compelled to resolve serious constitutional issues. For the FPC to undertake a general duty to protect consumers from undue costs, but to abjure responsibility for dealing with costs attributable to discrimination, amounts to a singling out of race problems for disfavored treatment. In this and in other aspects of its pervasive and inextricable involvement with private utilities, the FPC reinforces and supports private discrimination. Perhaps the test of "state action" would be more rigorous if the interests at stake were of a nonracial nature or if a far-reaching intrusion into private activity were sought. But where, as here, discrimination is the issue, this Court, mindful of the original thrust of the Fourteenth Amendment, has been consistent and scrupulous in condemning every distinction based on race.

ARGUMENT

I.

DISCRIMINATION IN EMPLOYMENT BY NATURAL GAS AND ELECTRIC POWER UTILITIES IS RELEVANT TO THE REGULATORY DUTIES OF THE FEDERAL POWER COMMISSION UNDER THE FEDERAL POWER ACT AND THE NATURAL GAS ACT.

A. The Federal Power Commission's Responsibility Requires it to Consider National Policies Affected by its Actions Including Those not Expressly Listed in its Enabling Statutes.

The Federal Power Commission contends that, however strong the national policy against employment discrimination may be and however poor the posture of its regulatees, there is literally nothing the FPC can do about it, because employment practices are excluded from its range of permissible concerns. This extremely narrow view of its public interest mandate is in conflict with holdings of this Court which have consistently construed the Federal Power Act and the Natural Gas Act as embracing *all* important aspects of public policy that may be affected by the Commission's actions, or related to its basic purposes. As this Court has stated, the law "requires the Commission to evaluate all factors bearing on the public interest." *Atlantic Refining Co. v. FPC*, 360 U.S. 378, 391 (1959); *FPC v. Transcontinental Gas Corp.*, 365 U.S. 1 (1961). *See also, e.g., City of Chicago v. FPC*, 385 F.2d 629 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956).[8]

[8] The Court has ruled frequently that administrative agencies, in carrying out their regulatory responsibilities, must consider and [footnote continued]

The narrow view of the public interest that the agency advances here has not met with success in this Court in the past. In *Gulf States Utilities v. FPC*, 441 U.S. 747 (1973), the Court rejected the argument that the FPC's responsibilities do not include consideration of possible anti-competitive consequences flowing from the issuance of a security. Similarly, in *Udall v. FPC*, 387 U.S. 428 (1967), this Court refused to accede to the FPC's limited view of its duty to serve the public interest in licensing a hydroelectric power project, requiring FPC to consider the impact of the project on national conservation policy, despite the fact that conservation policy was articulated in other legislation. In each case the existence of national policy on matters that were related to the agency's discharge of its duties required the FPC to look beyond the parameters of its own statute to protect the public interest.[9]

[footnote continued from preceding page]
promote national objectives beyond those expressly set forth in their statutes. For example, in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), the National Labor Relations Board declined to consider whether a work stoppage violated Federal criminal law. This Court condemned this myopic approach and said, *id.* at 47:

> ... the [National Labor Relations] Board has not been commissioned to effectuate the policies of the Labor Relations Act so singlemindedly that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

See also Denver & R.G. W. R.R. v. United States, 387 U.S. 485 (1967); *FMC v. Svenska Amerika Linien*, 390 U.S. 238 (1968).

[9] In addition to being required to look beyond its own statute to consider national antitrust and environmental policies, the Commis-
[footnote continued]

It is in the context of this articulation of the public interest–a definition neither so broad as to encompass extraneous matters, however important, nor so narrow as to exclude from consideration the diverse impact of agency action on citizens–that this case must be considered.

That the assurance of equal employment opportunity for all, free from discrimination based on race, color, religion, sex or national origin, is a national policy "of the highest priority," can hardly be disputed. *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). With roots in the Declaration of Independence. this abiding commitment to fairness and equality has been most explicitly articulated by Congress in Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352. 78 Stat. 253, 42 U.S.C. §2000e *et. seq.*, supported by this Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-801 (1973); and *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971); reaffirmed by the Equal Employment Opportunity Act of

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sion has been told to consider matters related to national defense. *See National Coal Ass'n v. FPC*, 191 F.2d 462 (D.C. Cir. 1951); *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956). Other administrative agencies have had national labor policies and health considerations encompassed within their duty to promote the public interest. *See Retail Store Employee Union v. FCC*, 436 F.2d 248 (D.C. Cir. 1970); *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968). Judge Burger, as a member of the United States Court of Appeals for the District of Columbia Circuit, ruled that racial discrimination is a factor that a non-civil rights administrative agency must consider in effectuating the public interest. *See Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994, 1007 D.C. Cir. 1966), where the court held that programming misconduct which included charges of racial discrimination and some elements of religious discrimination "would preclude, as a matter of law, the required finding that renewal of the license would serve the public interest."

1972, Pub. L. No. 92-261, 86 Stat. 103, 42 U.S.C. §2000e *et. seq.* and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The national policy against invidious employment discrimination finds expression in other statutes and regulations as well, including Section 1 of the Civil Rights Act of 1866,[10] the Equal Pay Act,[11] the Federal labor laws,[12] executive orders covering government and federal-aid contractors and subcontractors,[13] rules issued by regulatory agencies,[14] and the laws of at least 40 states[15] and numerous cities and municipalities.

The FPC does not contend that equal employment opportunity is not a fundamental national policy and part of the overall public interest. Rather, the FPC takes the

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[10] 42 U.S.C. §1981. See *Johnson v. REA*, 421 U.S. 454 (1975).

[11] 29 U.S.C. §206.

[12] The Railway Labor and National Labor Relations Acts (45 U.S.C. §§151-162; 29 U.S.C. §§151-168) require unions certified as exclusive bargaining representatives to represent fairly all employees in the unit; *see Vaca v. Sipes*, 386 U.S. 171 (1967); *Syres v. Oil Workers International Union*, 350 U.S. 892 (1955); *Steele v. Louisville & N. R. Co.*, 323 U.S. 192 (1944); and proscribe as unfair labor practices racial discrimination by unions or employers; *see United Packinghouse, Food & Allied Wkrs., Int'l Union v. NLRB*, 416 F.2d 1126 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 903 (1969); *Local Union No. 12, United Rubber Co., L & P Wrkrs v. NLRB*, 368 F.2d 12 (5th Cir. 1961), *cert. denied*, 389 U.S. 837 (1967); *Independent Metal Workers Union, Local 1 (Hughes Tool Co.)*, 147 NLRB 1573 (1964).

[13] Executive Order 11,246, as amended, 3 C.F.R. 169 (1974). *See Farkas v. Texas Instrument Inc.*, 375 F.2d 629 (5th Cir. 1967); *Farmer v. Philadelphia Elec. Co*, 329 F.2d 3 (3d Cir. 1964).

[14] *See, e.g.;* 47 C.F.R. §21.307 (FCC); 12 C.F.R. §528.7 (FHLBB).

[15] *See* J. A. 23-24; Lab. Rel. Rep. FEP Manual 451:21-26 (1975).

position that equal employment opportunity is not part of that particular corner of the public interest which it is assigned to protect. The agency is unable to see the slightest relationship between its duties under the Federal Power Act or the Natural Gas Act and the policies expressed in civil rights laws. "Since Congress did not make the eradication of employment discrimination an object of the Commission's enabling statutes", it argues, "the Commission has no powers or duties in this area. The Commission can do no more or no less than what Congress has authorized it to do." Pet. Br. at 17.

Fortunately, the Court of Appeals accurately perceived the clear connections between unlawful discrimination in the employment practices of FPC regulatees and the essential purposes of the enabling legislation. As the following discussion shows, this relationship is so concrete and its consequences so manifest that the Commission has a duty to take appropriate steps to deal with employment discrimination by the companies it regulates.

B. Employment Discrimination Has a Direct Bearing on the Federal Power Commission's Regulatory Activities.

1. Consumer Protection From Undue Costs

First, violation of the fair employment practices laws and remediation thereunder involves distinct costs to consumers. These include the following:

—*Backpay*. One central purpose of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co. v. Moody*, *supra* at 418. Without excluding other types of compensatory

damages,[16] Title VII provides that backpay to compensate for lost wages may be awarded on a class basis to the victims of discriminatory practices, even absent exhaustion of administrative procedures by unnamed class members. *Id.* at 414 n.8. Consonant with the purposes of this law, denial by a court of a backpay award must be supported by good and sufficient reasons. *Id.* at 417.[17]

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[16] For example, compensatory damages for past discrimination may be claimed independently under 42 U.S.C. §1981. See *Johnson v. REA*, 421 U.S. 454 (1975).

[17] Back pay awards involve significant sums of money. In fiscal year 1975, the EEOC and state and local fair employment agencies achieved conciliation settlements that provided monetary benefits of nearly $111 million. *See* CCH Labor Law Reports, No. 96 (Nov. 20, 1975). The initial calculation of back pay under the consent decree against the steel industry amounted to $30,940,000. See G. Ginsburg, Cases and Materials on Equal Employment 334 (1974). The consent decree against the Bell system is discussed in note 18, *infra*. In *U.S. v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973), black victims of discrimination were awarded more than $2,000,000, including $1,750,000 in back wages, over $90,000 in back per diem for travel and living expenses and over $200,000 in additional pension benefits. This was the first case of pension relief in an employment discrimination case. See Ginsburg, *supra* at 191. In a sex discrimination case against the Bank of America, a consent decree was entered into which provided that $3,750,000 would be put into trust over a five-year period to induce women employees to undertake management training and to prepare them for higher management positions. *Id.* at 341. Recoveries under the Equal Pay Act also can be of extreme economic consequence. Without resort to litigation, the Department of Labor secured the restoration to employees of $6,841,443 in underpaid wages in fiscal year 1974 and of $4,626,251 in fiscal year 1973. *See* U.S. Commission on Civil Rights, V The Federal Civil Rights Enforcement Effort–1974 441 n.1366 (1975). Litigation produced additional recoveries of $16,914,967 in fiscal year 1974 and $10,914,967 in fiscal year 1973. *Id.* at 456.

–*Prospective relief.* Under both Title VII and 42 U.S.C. §1981 the courts have broad equitable powers to fashion prospective relief that will eliminate the continuing effect of past discrimination. For example, where individuals have been wrongfully denied promotion into higher-paying positions that have been filled by others, they may be awarded "forward pay" relief at the higher rates without actually changing jobs at that time. This, in effect, is a form of interim reparations pending the achievement by victims of discrimination of their "rightful place" in the future. *See* G. Cooper, H. Raab and H. Rubin, Fair Employment Litigation 463-64 (1975). Similarly, "red circling," or rate-retention for transferees to entry-level jobs in other progression lines, may be ordered in appropriate cases. *See, e.g., United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971). In each case, the remedy involves payment of "duplicative" wages, *i.e.*, for work that is not really being performed by the employee.

–*Litigation costs.* The major but by no means only costs in this category are attorneys' fees. In many cases defendants must bear not only their own fees and related costs of representation but also those of their antagonists in the litigation. *See, e.g., Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). Such costs are very real and quantifiable consequences that may flow from violations of the civil rights laws, and they may involve substantial sums amounting to many millions of dollars.[18]

In addition discrimination entails non-remedial costs, definable in terms of diminished labor productivity and

[18] The potential costs of compliance with the equal employment laws by utilities are demonstrated by the January, 1973 consent

efficiency, that are attributable to the effects of the discriminatory practices themselves rather than their legality. One need not embrace an "invisible hand" theory[19] to understand that any system which arbitrarily excludes a substantial part of the potential workforce, regardless of qualifications, will be less efficient in the long run than one which makes use of all available manpower resources.[20] The Council of Economic Advisors noted in 1965 that "[d]iscrimination against minorities—Negroes, Puerto Ricans, Spanish-Americans, Indians, and others—has significant economic and social costs. It is estimated that

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decree entered in *Equal Employment Opportunity Commission v. American Tel. & Tel. Co.*, Civil No. 73-149 (E. D. Pa. 1973), reprinted in 1 CCH Empl. Prac. Guide ¶1860 at 1533-3. As the District Court later noted in that litigation, the settlement is a "monumental" one which "goes to the very heart of the system—money, goals, timetables, affirmative action programs, employee information programs, compliance monitoring, pay adjustments, new transfers and immediate promotion options." *EEOC v. AT & T*, 365 F. Supp. 1105, 1108 (E.D. Pa. 1973), *aff'd*, 507 F.2d 735 (3d Cir. 1974). A supplemental consent decree was entered in that proceeding in March, 1974. Records of the EEOC indicate that the Bell System's compliance with these decrees during 1973 and 1974 involved out-of-pocket expenditures in excess of $110 million, including $20 million in non-recurring backpay awards and annually recurring costs of more than $50 million.

[19] *Cf.* Brief in this proceeding for Edison Electric Institute as Amicus Curiae at 16, n.31.

[20] G. Becker, The Economics of Discrimination, ch. 3 (1971); P. Samuelson, Economics, An Introductory Analysis, chs. 25, 27 (6th ed. 1964); M. Friedman, Economics and Freedom, 108-110 (1967). *See also* Boyle, *Equal Opportunity for Women is Smart Business*, 51 Harv. Bus. Rev. 85 (1973); U.S. Dept. of Labor, Final Report, Tri-Faith Trucking Terminal Employment Project, Contract No. 83-15-68-51 (1971).

society loses up to $20 billion per year of potential production as a result of employment discrimination and poorer educational opportunities for nonwhites."[21] After a lengthy analysis, Professor Lester Thurow of the Massachusetts Institute of Technology reached a similar conclusion: "[d]iscrimination causes a large reduction in the potential level of output of the American economy. Negro economic resources are not fully utilized and white resources are inefficiently utilized as a result of discrimination. Efficiency losses amount to approximately $19 billion per year."[22] Significantly, it is precisely to prevent government suppliers and contractors from "increasing [their] costs and delaying [their] programs by excluding from the labor pool available minority workers" that the government's power to extend equal employment opportunity requirements to federally-assisted state construction projects has been found justified, even absent specific

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[21] Council of Economic Advisors, Economic Report of the President 167 (1965). With respect to sex discrimination: "job bias costs American women tens of billions a year in foregone wages, and costs the nation as a whole billions more in lost economic output." *Business in Brief*, No. 108, February 1973 (Published by Chase Manhattan Bank and quoted in R. Covington, Labor Relations and Social Problems, Discrimination in Employment 20 (2d ed. 1973)).

[22] L. Thurow, Poverty and Discrimination 158 (1969). *See also* U.S. Civil Commission on Civil Rights, *Statement on SPDR-30, Advance Notice of Proposed Rule Making on Discrimination in Airline Employment, CAB Docket No. 24636,* (Sep. 1972) at 3-4:

> Employment discrimination gives rise to inefficiency. Excluding a group of qualified potential applicants creates an artificial restriction on the labor force which would otherwise be at the employer's disposal. This may tend to inflate wages, limit the quality of work performance, and result in preventing the employer from realizing an optimum return on labor cost expenditures.

statutory authorization. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971). The court there stated, *id.* at 171:

> In direct procurement, the federal government has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects. It has an identical interest with respect to federally-assisted construction projects.

See also United States v. Mississippi Power & Light Co., 10 FEP Cases 1084 (S.D. Miss. 1975). Similarly, inefficiencies may also result from the demoralizing effects of discriminatory employment and promotional practices upon employees who are disadvantaged by them.[23] The United States Court of Appeals for the District of Columbia Circuit has noted that "Senate and House hearings on equal employment bills are laced with references to the degradation, disillusionment, lack of motivation, and lessening of incentive to improve which result from racial discrimination in employment (footnote omitted)" *United Packinghouse, Food & Allied Workers, International v. NLRB*, 416 F.2d 1126, 1137 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969).

The difficulties inherent in measuring such costs precisely do not make them any less real or substantial, or any more proper a burden to impose upon consumers.[24]

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[23] *See* M. Levine, The Untapped Human Resource: The Urban Negro and Employment Equality 133-34 (1972). *See also Miller v. International Paper Co.*, 408 F.2d 283, 294 (5th Cir. 1969).

[24] Expert testimony presented by the EEOC in proceedings before the Federal Communications Commission based on a study of

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Even without quantification, it is likely that the loss of efficiency and productivity caused by discrimination in employment involves costs to the public that exceed even those that stem from liability under Title VII or similar litigation. The views of the General Services Administration, the agency which is responsible for protecting the federal government's interest as a consumer of electric power, are worth noting in this regard:

> GSA believes the employment practices of a regulated monopoly to be a proper issue in rate increase proceedings. The regulated company's discriminatory employment practices may have substantially and unreasonably increased the cost of providing the service during the test period used in the proceeding for rate-making purposes, and, if so, this issue should be raised for Commission consideration.
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> * * *
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> Disregarding the individual jurisdiction and power of the Commission in question, an employment practice issue could be raised directly in any proceeding by presenting it in the posture of traditional cost of service approach. While it would be difficult to establish an adequate record in this area, certain connections between the utility's employment practices and its cost of service could be shown. For example,

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long-distance telephone service concluded that rates were two to four percent higher as a result of AT & T's discrimination against women. Statement of Dr. Orley Ashenfelter, Director, Institute of Industrial Relations, Princeton University, EEOC Exhibit 5 in FCC Docket 19143 (December 1, 1971).

> to the extent a company engages in unfair hiring and promotion practices, such acts would have a cost of service effect, especially in wage and salary expense. In this respect, certain expenses could be disallowed. Moreover, since such practices most certainly effect the utilities' overall efficiency, the rate of return granted to the utility could be established at the lower end of the zone of reasonableness. Quite frequently, utilities contend excellent efficiency warrants a rate of return fixed at the high end of the zone of reasonableness or a small extra return allowance.[25]

No one disagrees with the Court of Appeals' conclusion that protecting consumers from improper or unnecessary costs of gas and electric utilities—effectively keeping rates at the lowest reasonable levels—is one of the FPC's major obligations. Indeed, the Commission itself concedes that it must disallow costs that are "unnecessary or illegitimate," including costs arising from or associated with conduct that violates other laws governing economic activity. Pet. Br. at 12, 25-26. Having said this much, however, the Commission refuses to take the logical next step by acknowledging that costs arising from or associated with illegal discriminatory hiring practices must also be excluded from the rates of its regulatees.[26] Quite obviously these costs are not necessarily

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[25] Letter from Harold S. Trimmer, Jr., Acting Administrator, General Services Administration, to Rep. Don Edwards, *Hearings Before the Civil Rights Oversight Subcommittee of the Comm. on the Judiciary*, "Responsibilities of the Federal Power Commission in the Area of Civil Rights", 92d Cong., 2d Sess., 148 150 (1972).

[26] In *Virginia Electric Co.*, 46 FPC 299 (1971), the Commission rejected an attempt of the NAACP to challenge a $2 million increase in wholesale rates because of the pervasive employment discrimination

[footnote continued]

incurred in providing service to the public. Rather, they result from improper practices that are contrary to law and extraneous to the companies' essential public utility functions. While the FPC appears to concede that such costs may not legitimately be included in the rates its concession has no practical effect since it has no regulations and no procedures by which consumers may be protected from these needless expenses.[27] Clearly, as the Court of Appeals held, consideration of the costs of employment discrimination as they affect rates and services is within the Commission's jurisdiction and mandate.

This conclusion is fortified by the express provisions of the Commission's enabling legislation. Specifically,

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engaged in by the utility. In its brief to the Court of Appeals in the instant proceeding, the FPC appeared to have conceded (Brief for Respondent at 30, NAACP *et al.* v. FPC, 520 F.2d 432 (D.C. Cir. 1975)) that costs of discrimination could be challenged by interveners in a rate proceeding. The court astutely observed that: "It is obvious that a concession of this kind is not compatible with any flat statement that the Commission has no authority to consider the fact of employment discrimination in its public interest determination." Cr. Pet. App. D at 7.

[27] The mere assertion in the FPC's general instructions for its accounting regulations that all plant and operating expenses must be "just and reasonable", Pet. Br. at 25 n.17, merely restates the law and does not resolve which costs of discrimination, if any, must be excluded or the methodology of computing such costs. The exclusion of "penalties" as provided in Account 426.3, 18 C.F.R. Parts 101 *et seq.* (see Pet. Br. at 27 n.18) is irrelevant, because the kinds of relief that may be awarded in employment discrimination litigation, as described above, are generally considered to be in the nature of reparations rather than penalties or fines. The treatment of punitive damages, if available in such suits, may be covered by the FPC's penalty exclusion rule, but that is not entirely clear.

section 206(a) of the Federal Power Act provides that whenever the Commission finds that any "practice or contract" that affects the rates or charges for transmissions or sales subject to its jurisdiction is "unjust, unreasonable, unduly discriminatory or preferential," it is to "determine the just and reasonable . . . practice, or contract to be thereafter observed and in force." 16 U.S.C. §824e(a). Virtually identical language is found in section 5(a) of the Natural Gas Act, 15 U.S.C. §717d.

In *Boynton v. Virginia*, 364 U.S. 454 (1960) and *Mitchell v. United States*, 313 U.S. 80 (1941), the Court held that comparable language in the Interstate Commerce Act prohibits racial discrimination by common carriers in providing services. While those cases dealt specifically with service discrimination rather than employment, the Court noted in *Boynton* that the legislation "uses language of the broadest type to bar discriminations of all kinds," 364 U.S. at 457, and in *Mitchell* it found "no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach." 313 U.S. at 94. On its face, the explicit language of the Federal Power Act and the Natural Gas Act is equally sufficient to reach all forms of discriminatory practices that may affect utility rates, including discriminatory employment practices.[28] Thus, the FPC not only can and should disallow costs attributable to employment discrimination but is authorized by sections 205(a) of the Power Act and 5(a) of

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[28] *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), supports this view. There, the Court, considering similar nondiscrimination language in the Federal Aviation Act, assumed without hesitation that it would "protect job applicants or employees from discrimination on account of race." *Id.* at 723.

the Gas Act to govern affirmatively those practices in order to prevent illegitimate and improper costs from being passed on to the consuming public.

2. Financial Condition of the Industry

If costs associated with discriminatory practices in the utilities industry are more than nominal–and given the public record already established by the industry, there is reason to expect that they may be considerable[29] –the Commission may not be able to fulfill its public interest mandate simply by disallowing those costs in ratemaking. In the short run, that may indeed help to protect consumers from immediate increases in rates, but it will also result in diminished profits for shareholders. To be sure, the equitable nature of Title VII remedies renders it unlikely that any utility would actually be made insolvent and unable to continue operations as a result of an adverse judgment in a class action, no matter how bad the company's record might be. But it is not at all inconceivable that dividends might be missed, or bond ratings lowered, if substantial costs were disallowed and had to be absorbed by the company.

Any such consequences, especially in a setting where the financial health of utility companies is seen as "the greatest electric power problem confronting the industry and the Nation," Federal Power Commission, Fifty-Fourth

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[29] *See, e.g., Hearings, supra* note 4; U.S. Equal Employment Opportunity Commission. *Promise v. Performance* (1972); U.S. Equal Employment Opportunities Commission, Employment Patterns in the Utilities Industry, 1966-67, Research Rep. No. 1968-26 (1968); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973), *modified sub nom., EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975).

Annual Report, Fiscal Year 1974 at 9 (1975), would have to be of real concern to the agency, which must also assure the industry's continuing ability to meet the need for services to the public.

In short, if Commission concern about discrimination is confined to the ratemaking stage the FPC may find itself faced with unacceptable alternatives: either to let ratepayers absorb the costs associated with discriminatory practices which, we submit, would violate the statute, or to impose them on the utility and its shareholders, which could impair the company's financial health. To avoid any potential adverse impact on the utilities' financial condition as well as the imposition of additional cost burdens on the public, the FPC would be well within its authority in taking basic preventive steps designed to assure that unlawful employment discrimination is not practiced by its regulatees.

3. Fitness and Qualifications of Licensees

Licensing is another function of the Commission in which consideration of fair employment practices is relevant. FPC licensees, as the recipients of substantial public benefits and privileges including the governmental power of eminent domain, must also be willing to accept public responsibilities such as compliance with national laws and policies forbidding employment discrimination. As the Court said in *FCC v. American Broadcasting Co.*, 347 U.S. 284, 289-90 n.7 (1954), "[t]he 'public interest, convenience, or necessity' standard for the issuance of licenses would seem to imply a requirement that the applicant be law-abiding."

The FPC's enabling legislation gives it broad authority to assure that its licensees are not and will not be engaging

in improper or illegal conduct. Under section 10(a) of the Federal Water Power Act, licenses are to be issued for hydroelectric projects only when in the Commission's judgment they "will be *best* adapted to a comprehensive plan" for waterway development "for the use or benefit of interstate or foreign commerce . . . and for other beneficial public uses, including recreational purposes." 16 U.S.C. §803(a) (emphasis added). The Commission may order modification of the project and impose whatever conditions it considers to be in the public interest. 16 U.S.C. §803(g). Certainly if would not be improper for the Commission to take account of an applicant's record of employment discrimination in determining whether its proposal is the "best" plan for development, or in giving preference to a competing applicant whose record is better.[30] "The test is whether the project will be in the public interest. And that determination can be made only after an exploration of all issues relevant to the 'public interest'. . . ." *Udall v. FPC*, 387 U.S. 428, 450 (1967).

Similarly, in issuing certificates of public convenience and necessity for construction of a natural gas pipeline or for the sale or transportation of gas under section 7 of the Natural Gas Act, the Commission has broad powers to protect the public interest, and in exercising these powers it must consider "all factors bearing on the public interest." *Atlantic Refining Co. v. FPC*, 360 U.S. 378, 391 (1959).

The desire to reduce air pollution, the national policy to stimulate investment in industry, national defense and

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[30] Similarly, a private applicant's poor record of compliance with the equal employment laws might be relevant to a determination that federal development of the project would be preferable. *Cf. Udall v. FPC*, 387 U.S. 428 (1967).

security, promotion of competition, and the dissemination of information to the public are all properly within the agency's scope of inquiry in certification proceedings. *See, e.g., FPC v. Transcontinental Gas Corp.*, 365 U.S. 1 (1961); *City of Chicago v. FPC*, 385 F.2d 629 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); *Alabama Power Co. v. FPC*, 511 F.2d 383 (D.C. Cir. 1974); *National Coal Ass'n. v. FPC*, 191 F.2d 462 (D.C. Cir. 1951); *Cf., FCC v. American Broadcasting Co., supra.* Nothing in the Act or in logic suggests that the national policy of nondiscrimination in employment is not similarly an appropriate matter for Commission concern in such proceedings.

The fact that the government is a major consumer of electric power and natural gas for the government's needs[31] underscores another reason for the Commission to consider whether the companies seeking authority to provide those services are in compliance with the equal employment laws. Federal regulations prohibit the government from contracting for goods or services with anyone engaged in discriminatory employment practices.[32] Because of the monopoly status of gas and electric utility companies, the government generally does not have an option in selecting suppliers of gas or electricity for its installations. Refusing to contract or terminating a contract is not a very realistic course of action when a NASA facility, for example, is involved.[33] While a suit against the utility is a possible

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[31] *See, e.g., National Coal Ass'n. v. FPC*, 191 F.2d 462 (D.C. Cir. 1951); *U.S. v. Mississippi Power and Light Co.*, 10 FEP Cases 1084 (S.D. Miss. 1975); *U.S. v. New Orleans Public Services, Inc.*, 8 FEP Cases 1089 (E.D. La. 1974).

[32] *See* Executive Order No. 11,246, as amended, 3 C.F.R. 169.

[33] *Cf. United States v. New Orleans Public Services, Inc.*, 8 FEP Cases 1089 (E.D. La. 1974).

alternative, it is a time consuming and costly procedure for both the government and the utility.[34] A far more effective way to insure that utilities are in compliance with the equal employment laws is during the licensing, certification and ratemaking processes.

Contrary to the FPC's assertion (Pet. Br. at 15), we are *not* advocating an "all-or-nothing" approach whereby any substantial evidence of discrimination would necessarily require the denial or termination of a license. A far better approach, in our view, would be to use the licensing process to examine the practices of the applicant and to impose any conditions that may be necessary to assure full compliance with the equal opportunity laws. In any event, it is evident that employment discrimination is one of many factors relevant to the Commission's public interest mandate in licensing.

C. The Laws Establishing Equal Employment Policy Do Not Vest Exclusive Jurisdiction in Any One Agency and In No Way Foreclose the FPC from Assisting in Eliminating Job Discrimination by Utilities.

The FPC contends that Congress has endeavored in the civil rights laws to centralize all government concern with the problems of employment discrimination in a single authority, the Equal Employment Opportunity Commission. Thus, FPC urges, it is effectively preempted from taking action in this area. Significantly, the FPC cites no statutory language and no legislative history in support of this argument, for neither are to be found.

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[34] *See United States v. Mississippi Power and Light Co.*, 10 FEP Cases 1084 (S.D. Miss. 1975), where the United States was awarded the taxable costs of the litigation.

Nothing in Title VII evinces any Congressional intent to limit the authority of agencies other than the EEOC from acting to promote the national policy of nondiscrimination.[35] As this Court has emphasized, Congress recognized in that law "the importance of a full arsenal of weapons to combat unlawful employment discrimination in the private as well as the public sector." *Johnson v. Railway Express Agency*, 421 U.S. 454, 468 (1975) (separate opinion of Marshall, Douglas and Brennan, JJ.). That judgment was strongly reaffirmed by Congress in the 1972 amendments to Title VII.[36] Indeed, in 1972 Congress

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[35] The limitation stated in Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d, *et. seq.*, partially precluding *that* title from covering employment practices certainly cannot be considered evidence of any national policy to centralize the entire government's concern with employment discrimination. Title VI, of course, is a general statute applying to a broad array of federal subsidies, grants and aid programs whose beneficiaries may have little or no other contact with the federal government. That title has nothing to do with the issues involved in this case, *i.e.*, the responsibilities of an economic regulatory commission with respect to rampant discrimination practiced by its regulatees. Even with the proviso in Title VI, it might be noted, in fact many grant-making agencies do prohibit employment discrimination by beneficiary organizations under both that title and related statutes. *See, e.g.*, 23 U.S.C. §324, 23 C.F.R. §25.1 *et. seq.* (DOT); 42 U.S.C. §3751, 42 C.F.R. §203 *et. seq.*; (LEAA); 31 U.S.C. §1242(a) 31 C.F.R. §51.326 (Treasury). *See also United States v. Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970).

[36] Pub. L. No. 92-261, 86 Stat. 103, 42 U.S.C. §2000e *et. seq.* The leading commentary on the legislative history of the 1972 amendments concluded that "congressional intent in adopting Public Law 92-261 clearly does not preclude resort to alternative enforcement mechanisms for equal employment opportunity, and in fact the actions of Congress reflect the contrary intent." Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity*

[footnote continued]

considered and rejected proposals to centralize in the EEOC the government's responsibilities for assuring equal employment opportunities,[37] instead opting to establish a new Council to promote coordination and cooperation among the numerous agencies that are involved in these problems.[38]

Congress was well aware of the actions taken and proposed by various economic regulatory agencies with respect to employment discrimination, and agency efforts in that regard were directly challenged in the debate on the floor of the Senate. Senator Hruska, sponsor of an amendment which would prohibit non-civil rights agencies from such activities, stated as follows:

> It is the [Equal Employment Opportunity Commission's] position that in addition to nonregulatory administrative agencies such as the National Labor Relations Board, Federal regulatory agencies such as the FCC and ICC similarly have the authority to regulate the employment practices of those who are subject to their jurisdiction.
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Act of 1972, 40 Geo. Wash. L. Rev. 824, 885 (1972). *See also* S. Rep. No. 92-415, 92d Cong., 1st Sess. 24 (1971); Joint Explanatory Statement of Managers at the Conference on H.R. 1746, *To Further Promote Equal Employment Opportunities for American Workers*, reprinted in U.S. Code Cong. & Admin. News, 92d Cong., 2d Sess. 2179. 2185 (1972).

[37] *See* J.A. 64.

[38] Pub. L. No. 92-261, 86 Stat. 111, 42 U.S.C. §2000e-14.

> Thus, in addition to all the other actions a respondent can be subjected to, the Commission would include Federal regulatory agencies in that already bulging list. It is apparently of no consequence to the Commission that such agencies have neither the requisite experience in the area of civil rights in employment, nor the knowledge, training, resources or investigative know-how to involve themselves in that area.

118 Cong. Rec. 3960 (Feb. 15, 1972). Senator Javits vigorously opposed this amendment because among other things, it would preclude regulatory agencies from considering employment discrimination in rate-making proceedings. *Id.* at 3962. The Senate's rejection of this amendment, and the subsequent elimination of a provision in the House bill to centralize all responsibility in the EEOC to implement and enforce the nondiscrimination laws in employment,[39] are strong indicators that Congress approved of the assumption of duties by agencies such as the FPC and FCC to consider evidence of discrimination by their regulatees.[40]

Practical experience with the implementation of fair employment law has confirmed the wisdom of Congress in refusing to accept proposals for preemption. The EEOC has been faced with a mounting backlog of complaints,

[39] H.R. 1746, §11. In the same year, 1972, Congress, enacting the State and Local Fiscal Assistance Act, did not include the employment exception in a Title VI-type provision requiring the Department of Treasury to prevent discrimination. *See* 31 U.S.C. §1242. That law has been construed to require Treasury to prevent job discrimination by its 39,000 state and local grantees. *United States v. City of Chicago*, 395 F. Supp. 329 (N.D. Ill. 1975).

[40] The EEOC, which has primary responsibility for interpreting and implementing the civil rights laws as they relate to employment

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apparently exceeding 100,000 in March, 1975. U.S. Commission on Civil Rights, V The Federal Civil Rights Enforcement Effort–1974 at 529 (1975). To resolve problems of discrimination in a timely and efficient manner the agency has increasingly espoused preventive measures including the enlistment of other federal agencies in the effort to curb discrimination. Where, as with the FCC, the cooperation and support of other agencies has been obtained, the overall result has been to ease the administrative burden and facilitate progress. See note 47, *infra*.

II.

IT WILL NOT IMPOSE AN UNDUE BURDEN ON THE FEDERAL POWER COMMISSION TO TAKE COGNIZANCE OF DISCRIMINATION BY ITS REGULATEES

The issue presented by the FPC to this Court is whether it lacks jurisdiction to take cognizance of employment discrimination by its regulatees in performing its duties under the Federal Power Act and the Natural Gas Act. Much of the argument in its brief, however, goes to a very different question–namely, the practical problem of

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discrimination, strongly supports the view that Title VII does not preclude or preempt responsible FPC action in this area. On the contrary, the EEOC has consistently underscored the need for and appropriateness of coordinate regulatory measures by the FPC, under its enabling legislation, in support of the EEOC's overall program. *See* J.A. 87-89. Similar expressions by the Justice Department and the United States Commission on Civil Rights provide further support, if any is needed, for the view that Title VII in no way preempts the authority of the FPC to consider employment discrimination in its regulation of the electric power and gas utilities. *See* J.A. 27-32; U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort 361 (1970).

how the FPC can meet its responsibilities in the light of existing constraints on its resources. Pet. Br. at 10, 24-31. Although this does not pertain directly to the Commission's statutory jurisdiction, a brief response to the Commission's expressed fears is in order.

We do not contend, and have never contended, that the FPC is obligated to act in a manner that would impair its ability to function or conflict with the efforts of any other agency, nor is any such result dictated by the Court of Appeals' decision. What we *do* say is that the FPC cannot exclude from its public interest determinations relevant evidence of illegal employment practices in the industries it regulates. Once this responsibility is accepted it is for the Commission in the first instance to determine the proper scope of its concern and how, in the light of *all* relevant factors including resource limitations, it may best address itself to those matters.[41] That sensible, practical and effective approaches to the problem may be found by an agency with the motivation to do so seems clear, contrary to the doom-saying attitude expressed by the Commission and the *amici* supporting it.[42]

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[41] To the extent the Court of Appeals felt there was some ambiguity in our position (Cr. Pet. App. D at 5), we wish to make clear that the proposed draft of a nondiscrimination regulation submitted with our 1972 rulemaking petition, modeled on the FCC common carrier regulations, 47 C.F.R. §21.307, was, indeed, a draft. It was included because the FPC procedural regulations appear to require specific proposals to accompany rulemaking petitions, 18 C.F.R. §1.7(b), and because we believed it to be helpful to the Commission as a starting point in its inquiry. But we have not taken the position that that particular proposal and no other be enacted.

[42] Innovative solutions have, of course, been developed by the FPC to deal with difficult regulatory problems of the past, once its

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First, nothing requires the FPC to take an "inflexible all-or-nothing" approach. *See* Pet. Br. at 15.[43] The FPC might well find that the imposition of appropriate conditions is a more coherent and effective way of dealing with discriminatory practices than the outright denial of a license or certificate.[44] This approach has been expressly approved by this Court in other contexts, and it is one with which the FPC obviously is familiar. *See, e.g., Atlantic Refining Co. v. FPC*, 360 U.S. 378 (1959); *FPC v. Idaho Power Co.*, 344 U.S. 17 (1952). In fact, a specific recommendation was made to the Commission in 1969 by one of its top legal officers that all licenses and certificates of public convenience and necessity be conditioned to bar employment discrimination and to require non-

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duty to do so became clear. *E.g., Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942). With respect to employment discrimination, in 1969 the FPC's then-Deputy General Counsel concluded that the FPC had a duty to act and recommended that the Commission undertake a number of specific measures, well within its competence, to deal with this increasingly apparent problem. See Memorandum to FPC Chairman from David J. Bardin, April 17, 1969 in *Hearings, supra* note 4 at 89 [Bardin Memorandum].

[43] The FPC argues that the sanctions available to it—withholding a license or denying a rate adjustment—are too strong for the problem involved here and "inconsistent with the remedial sanctions otherwise provided by Congress for such violations." Pet. Br. at 10. But Congress has provided for sanctions analagous to those possessed by the FPC, in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, where discrimination can result in the cut-off of federal funds.

[44] Other regulatory agencies have required utilities to undertake remedial programs as a condition of obtaining rate increases, rather than denying relief outright. *See, e.g., Potomac Electric Power Co.*, 83 PUR3d 209 (D.C. Pub.Serv.Comm. 1970).

discrimination clauses in major contracts relating to the construction or operation of FPC licensed or certificated facilities.[45]

Second, no one expects the Commission to do the impossible, or to solve the entire range of possible problems instantaneously. Certainly it would be futile for the FPC to attempt a full investigation of a company's employment practices in each ratemaking and licensing matter that comes before it each year, and we are not advocating such an approach. So long as the agency is endeavoring in good faith to meet its responsibilities, it seems to us that it might properly move forward on a step-by-step basis.[46] A rulemaking investigation such as we have suggested would allow the FPC to determine in a responsible fashion how its priorities should be ordered, where the most serious problems exist, and how its authority might most effectively be brought to bear on them. If additional resources are needed, Congress should certainly be alerted to that fact.[47]

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[45] Bardin Memorandum, *supra* note 42.

[46] An effort towards tailoring solutions to particular factual and operational variables in the several types of companies under FPC regulation might well be justified.

[47] The experience of the Federal Communications Commission suggests that substantial results may be obtainable without an enormous allocation of agency personnel or money. For example, in FY 1976 that agency allocated $400,000 to investigate complaints of employment discrimination by broadcasters, cable television systems, and common carriers, to review licensees' annual reports of employment patterns and generally to enforce the nondiscrimination rules of the FCC. Supt. of Documents, Special Analyses, Budget of the United States Government, Fiscal Year 1976 214 (1975). One factor in FCC's success has been its ability to enlist the aid of other

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Third, nothing requires the FPC to abandon sound administrative practices and management in dealing with the issues of employment discrimination. While the Court of Appeals' decision obviously recognizes a broader range of relevant matters, it does not dictate that "large masses" of irrelevant materials and evidence must be introduced into its proceedings. Pet. Br. at 24, 28.[48] In any event, the agency's administrative law judges need not relinquish their normal governance of the hearing process and the admission of evidence.

Fourth, there is no reason why the FPC's efforts to deal with employment discrimination should conflict with or duplicate the activities of other agencies. On the contrary, the effort should be to maximize cooperation and coordination. The FPC, of course, does not have the primary responsibility for implementing equal employment opportunity, but it does have important supportive functions and it must give consideration to this aspect of

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agencies and private organizations to monitor and, in appropriate cases, challenge industry compliance with its rules–just as the FPC's Deputy General Counsel recommended in 1969. See Bardin Memorandum, *supra* note 42. *Cf. Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994, 1003-05 (D.C. Cir 1966).

[48] To the contrary, the circuit court specifically suggested that the FPC might consider developing rule-of-thumb guidelines for use in ratemaking cases to avoid problems in quantifying in each case the productivity losses due to discriminatory practices. Cr. Pet. App. D at 27. A similar approach has been suggested by the General Services Administration. *See Hearings, supra* note 4 at 150. Nothing advanced by the FPC suggests that factors affecting the costs of discrimination are so different for each utility that employment of a rule-of-thumb would not be justified. If there is an argument to be made that use of such a rule would be inequitable, there will be ample opportunity for the FPC to consider it on remand.

national policy in performing its functions. While the Commission staff presently does not hold great expertise in employment discrimination matters, the FPC should recognize that it does have valuable expertise about the operations and practice of the power and gas industries that civil rights enforcement agencies such as EEOC lack. Deep concern and frustration about these industries have been manifested by the EEOC, the Justice Department, and the Civil Rights Commission, and all have joined in the effort to get FPC involvement in this area.[49] Precisely to avoid any waste of effort by the FPC and any undue burdens on the industries, we suggest that the FPC accept affirmative action plans filed with any other federal agency as *prima facie* sufficient, that it should utilize the data already prepared for use by other agencies to inform itself of the extent of discrimination in various segments of the industry, and that it should refer Title VII complaints to the EEOC and defer to proceedings before that agency. *See* J.A. 46-47.[50]

The appropriate framework for considering the responsibilities of an agency having jurisdiction over matters within the primary jurisdiction of another agency was established in *Alabama Power Co. v. FPC*, 511 F.2d 383 (D.C. Cir. 1974). Judge Leventhal's opinion provides a specific response to the claims of non-expertise and undue burden now raised by the FPC, *id.* at 393:

> Other agencies, having primary concern with enforcement of the antitrust statutes, are

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[49] *See Hearings*, *supra* note 4 at 65-67, 121-124; J.A. 87-89.

[50] The 1969 Memorandum of the Deputy General Counsel strongly urged that FPC could and should work closely with EEOC, Justice and other agencies. Bardin Memorandum, *supra* note 42.

> presumably able to assist the Commission by giving advice on disputed issues of antitrust policy and by identifying the factual questions relevant to an assessment of the anticompetitive impact of a proposed action. The opportunity for consistency and evenhandedness in the development of policy that Congress has put within the ken of several administrative bodies is enhanced when one agency elicits the views of another and draws upon the latter's expertise. Such a procedure would embody sound administrative practice. The Commission retains an obligation to give reasoned consideration to the bearing of anti-trust policy on matters within its jurisdiction (footnote omitted).

In short, there is no basis to presume, as the FPC does, that any efforts on its part to address employment discrimination by its regulatees in a responsible fashion will necessarily conflict with or duplicate the work of other agencies. To the contrary, sound precedent exists for the establishment of a rational system for interagency cooperation under which the FPC, without being deflected from its major responsibilities, can make an appropriate contribution to implementation of the national policy against employment discrimination.

III.

WHILE THE FPC HAS BROAD DISCRETION IN DECIDING TO PROCEED BY RULEMAKING OR ADJUDICATION IT MUST AT LEAST ESTABLISH AND ANNOUNCE A POLICY AGAINST EMPLOYMENT DISCRIMINATION BY ITS REGULATEES AND PRESCRIBE THE MINIMAL STEPS FOR IMPLEMENTING THAT POLICY.

Accepting a certain degree of responsibility, consistent with its statutory mandate to assure that the public is not burdened with discriminatory employment practices in the power and gas industries, will not destroy the Commission's ability to function, for as we have shown above, and as the Commission is well aware, a common-sense, pragmatic approach is what is called for. While the specific contours of what should be done is a matter that should be left to the agency's discretion in the first instance—not to the courts'[51] —that discretion is not unlimited and must be exercised in a rational, lawful manner.

In particular, we believe the FPC does have an obligation to issue an affirmative rule in some form, even if nothing more than a declaration that employment discrimination is a violation of its policy and a description of how that policy will be implemented. Insofar as the Court of Appeals suggested that the agency might properly proceed in this area entirely on the basis of case-by-case adjudications, without any prior articulation of general rules or policies, Cr. Pet. App. D at 33 n.53, we think it was in error.

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[51] In this regard, we think the Court of Appeals was wrong in stating that the particular draft regulations appended to our rulemaking petition would be "well beyond the Commission's power to adopt." Cr. Pet. App. D at 31. If the Commission does have jurisdiction to consider employment discrimination, as we think it plainly does, it has a broader discretion in determining what rules to institute, so long as they bear a rational relationship to the agency's legitimate objectives. We see no reason why the agency's rulemaking discretion should be constricted at this premature date—before it has even considered the matter in rulemaking proceedings—by decreeing that it could not, even if it wanted to, adopt a regulation for the receipt of complaints concerning violations of substantive nondiscrimination rules. This is not to say that such relief *must* be enacted, but only that it should be left to the Commission's initial determination.

The issue of whether agencies should make policy through rulemaking or adjudicative procedures is one of the recurring questions of administrative law. In *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764-65 (1969) (plurality opinion), the Court said:

> The rule-making provisions of the [Administrative Procedure] Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application.... They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention. Apart from the fact that the device fashioned by the Board does not comply with the statutory command, it obviously falls short of the requirements of the Administrative Procedure Act. The "rule" created in *Excelsior* was not published in the Federal Register, which is the statutory and accepted means of giving notice of a rule as adopted; only selected organizations were given notice of the "hearing", whereas notice in the Federal Register would have been general in character; under the Administrative Procedure Act, the terms or substance of the rule would have to be stated in the notice of hearing, and all interested parties would have an opportunity to participate in the rule making (citation omitted).

The separate opinion of Mr. Justice Douglas in *Wyman-Gordon* detailed some of the policy reasons behind the APA's rulemaking provisions, *id.* at 777-79:

> The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming. It gives an opportunity for persons affected to be heard. * * * Agencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice. See H. Friendly, The Federal Administrative Agencies 45 (1962).
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> Rulemaking is no cure-all; but it does force important issues into full display and in that sense makes for more responsible administrative action.

Here the Commission has consistently adhered to a policy not to consider evidence of employment discrimination by its regulatees in any of its regulatory functions. This policy, expressly set forth in a series of formal orders issued by the Commission,[52] is well known among the agency's regulatees as well as public and private agencies concerned with employment practices. If that policy is now to be reversed, as we believe it must, that is an action of general prospective applicability and broad consequence for the public as well as the FPC's industry constituents. The Freedom of Information Act, 5 U.S.C. §552(a), expressly requires that the agency publish in the Federal Register its "substantive rules of general applicability . . . and statements of general policy or interpretations of general

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[52] In addition to its orders in this proceeding (J.A. 54, 90), the FPC's policy has been articulated in *Virginia Electric Power Co.*, 46 FPC 299 (1971) (ratemaking) and *Pacific Gas and Electric Co.*, 44 FPC 1365, 1366-8 (1970) (licensing).

applicability formulated and adopted by the agency." Both the letter and spirit of the Administrative Procedure Act, 5 U.S.C. §551, *et seq.*, as well as sound practice, require that major changes in policies of this nature be accomplished through the public rulemaking process. As the Court stated in *Morton v. Ruiz*, 415 U.S. 199, 232 (1974), one of the central purposes of that act is to assure "that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations."

While the FPC does have broad discretion in determining the administrative means to perform its regulatory functions, we submit that, in this instance, it would be an abuse of that discretion to proceed exclusively by adjudication. *Cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). This is particularly so because of the broad importance and complexity of the matters involved, the Commission's exclusion of employment discrimination issues in past adjudications, the widespread expressions by government and private agencies of concern and interest in assisting the Commission develop policy in this area, and the particular interest of minorities and the poor in these issues.[53] A decision that some form of rulemaking–if only the issuance of a statement of revised policy–is necessary, would hardly restrict the agency's broad discretion. It could still rely upon case-by-case adjudication as a principal means of developing information and experience needed to flesh out its policies and revise and develop its procedures.

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53 *See* Bonfield, *Representation for the Poor in Federal Rule Making*, 67 Mich. L. Rev. 511, 512 (1969).

The FPC may in its discretion decide at the rulemaking stage to develop more fully its policies and procedures in this area in the interests of achieving a prophylactic effect, particularly since it professes apprehension about the administrative burdens of case-by-case adjudication. That is for the FPC to decide. But to do less, we submit, would be an abuse of discretion.

IV.

THE FPC'S FAILURE TO RESPOND TO THE UNLAWFUL EMPLOYMENT PRACTICES OF ITS REGULATEES RAISES SERIOUS CONSTITUTIONAL QUESTIONS

A conclusion by this Court that the Federal Power Act and the Natural Gas Act do not confer jurisdiction on the FPC to deal with employment discrimination by its regulatees would necessitate an exploration of the FPC's constitutional obligation to prevent such discrimination. Such an exploration would raise serious and complex constitutional questions of the kind the Court traditionally has sought to avoid where a sound statutory basis exists for the relief sought. *See, e.g., Dandridge v. Williams*, 397 U.S. 471 (1970); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Ample statutory basis exists here, which should enable this Court to adhere to its wise policy of avoiding unnecessary constitutional adjudication. Nevertheless, we proceed to outline the constitutional issues involved in this case if it is not resolved on statutory grounds.

The constitutional duty we assert is of great importance but is limited in scope. Its importance and limitations derive from the facts that (A) protection here is sought against race and sex discrimination rather than some other impingement on the interests of citizens, and the

duty is asserted against a governmental and not a private entity; and (B) the governmental involvement here shown has a significant tendency to facilitate and reinforce private discrimination.

A. Where Protection is Sought Against Racial Discrimination and the Conduct of a Government Agency is at Issue, the Test of State Action is Less Onerous Than in Other Cases.

Our claim here is limited to the contention that a governmental entity may not in any way aid or support a denial of "equal protection of the law," "a more explicit safeguard of prohibited unfairness than 'due process of law' . . ." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Since the guarantee is more explicit in cases involving race and sex discrimination, the test of "state action" is less onerous. This differential standard recently was described by the Court of Appeals for the Second Circuit in *Jackson v. Statler Foundation*, 496 F.2d 623, 628-29 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975):

> It is noteworthy that several courts have considered claims that the activities of tax-exempt organizations constitute "state action." Significantly, these cases divide into two camps: where racial discrimination is involved, the courts have found "state action" to exist; where other constitutional claims are at issue (due process, freedom of speech), the courts have generally concluded that no "state action" has occurred. . . . This dichotomy is explained in part by the double "state action" standard which has been recognized—one, a less onerous test for cases

> involving racial discrimination, and a more vigorous standard for other claims" (citations omitted).[54]

This "double standard" derives from the history of the Fourteenth Amendment which is "unquestionably designed to condemn and forbid every distinction, however trifling, on account of race." *Oregon v. Mitchell*, 400 U.S. 112, 127 (1970).[55] It rests upon a recognition that "racial discrimination is so pecularily offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action'

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[54] *See also Weise v. Syracuse University*, 522 F.2d 397, 406 (2d Cir. 1975) ("Class-based discrimination is perhaps the practice most fundamentally opposed to the stuff of which our national heritage is composed, and by far the most evil form of discrimination has been that based on race. It should hardly be surprising, then, that in race discrimination cases courts have been particularly vigilant in requiring the states to avoid support of otherwise private discrimination, and that where the conduct has been less offensive a greater degree of tolerance has been shown"); *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1142 (2d Cir. 1973); *Lefcourt v. Legal Aid Society*, 445 F.2d 1150, 1155 n.6 (2d Cir. 1971); *Powe v. Miles*, 407 F.2d 73, 81-82 (2d Cir. 1968); *Pitts v. Department of Revenue*, 333 F. Supp. 662, 668-69 (E.D. Wisc. 1971).

[55] *See also Bright v. Isenbarger*, 314 F. Supp. 1382, 1393 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971) ("... as evidenced by the central meaning of the Fourteenth Amendment and the multiplicity of civil rights laws, our society, speaking authoritatively through its laws, has set itself against discrimination on the basis of race. On the other hand, the origins and central meaning of the Fourteenth Amendment and our basic societal values, as expressed by our laws, do *not* indicate that the constitutional requirement of due process which establishes the framework of the relationships between government and individuals should also be the standard for relationships between private individuals and organizations") (court's emphasis).

with respect to it than would be required in other contexts. . . ." *Coleman v. Wagner College*, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring). *Cf.* Mr. Justice Rehnquist dissenting in *Sugarman v. Dougall*, 413 U.S. 634, 649 (1973), and in *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164, 177 (1972).

Application of this differential standard would avoid some of the concerns expressed by the court below (*see* Cr. Pet. App. D at 30) and by the petitioners (*see* Pet. Br. at 36-38) about the ramifications of a conclusion that the FPC must take action to curb racial discrimination in the gas and electric utility industry. It would not follow, as the FPC claims, that "the entire panoply of rules for the enforcement of due process and equal protection will be placed upon the shoulders of each agency for separate enforcement." Pet. Br. at 36. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), for example, it did not follow that because the state was responsible for the racially discriminatory policies of the Eagle Coffee Shop it also would be responsible to insure that Eagle accorded any employee it discharged a due process hearing. And in *Norwood v. Harrison*, 413 U.S. 455, 464 n.7 (1973), the Court recognized a distinction between governmental responsibility when the issue involves separation of church and state and when racial discrimination is at stake:

> The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools. "State support of segregated schools through any arrangement, management, funds or property cannot be squared with the [Fourteenth] Amendments' command that no state shall deny to any person within its jurisdiction,

> the equal protection of the laws." *Cooper v. Aaron*, 358 U.S. 1, 19 (1958).

It is also important to recognize that the issue here concerns the duty of a *governmental entity*, the FPC, not whether the activities of a private institution are sufficient to constitute state action and thus create constitutional responsibilities.[56] *Cf. Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

This fact further narrows the parameters of our constitutional claim. As noted by Judge Henry Friendly, dissenting in *Jackson v. Statler Foundation, supra* at 637:

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[56] The Court of Appeals misconstrued respondents' argument. The court characterized our claim in these words:

> Petitioners' claim founded on the Constitution is that it not only empowers but also requires the Commission to proscribe employment discrimination by regulatees. This is because the actions of the regulated companies are assertedly "state action" and therefore subject to the Fifth Amendment's prohibition of racial discrimination.

Cr. Pet. App. D at 27. But it is clear from our brief below that we were asserting a duty on the part of the FPC and not arguing that the Commission's regulatees were engaged in "state action." See Brief for Petitioners at 57-59, NAACP *et al.* v. FPC, 520 F.2d 432 (D.C. Cir. 1975). It is noteworthy, however, that there are situations in which utilities have argued that they are engaged in "state action." *See, e.g., Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248 (4th Cir. 1971), where VEPCO claimed that certain of its actions were exempt from the anti-trust laws under the exception excluding "state action" from coverage. The court held that although the state regulatory Commission did not investigate or approve the practices in question, its silence meant approval and the requisite "state action" was present to merit exemption from the anti-trust laws. *See also Gas Light Co. of Columbus v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972).

"[a] holding that an otherwise private institution has become an arm of the state is much broader and can have far more serious consequences than a determination that the state has impermissibly fostered private discrimination."[57] This distinction, between acts of the government itself and conduct of private entities that is treated as tantamount to government action, has been applied by this Court. Much more is required when the quest is to clothe a private institution with the mantle of the government. The Court has insisted upon a "close nexus between the State and the challenged action . . .," *Jackson v. Metropolitan Edison Co., supra* at 351–so close that it must amount to a "symbiotic relationship," *Moose Lodge No. 107 v. Irvis, supra* at 175. This more stringent test is based on the legitimate concern to avoid obliterating the distinction between private and government action except where the

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[57] *See also* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activities,* 74 Colum. L. Rev. 656, 698-99 (1974):

> Decisions in suits to enjoin private persons must take into account the rights and interests asserted by the challenged party. The state support or promotion must, therefore, be significant enough to justify imposition of restraints on those private rights and interests involved in the challenged activity as well as on state support (or promotion). Where the state itself can be sued to enjoin its support, however, no consideration of private rights is required. . . .
>
> Thus, suits against the private person and suits against government for injunctive relief should involve quite different considerations. The former require that government's interest be significant enough to justify restricting the private interest as well. But in suits against government, no private interest is at stake, and thus none can be asserted to retard full relief against the state support.

government has "significantly involved itself with invidious discriminations." *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967).[58]

On the other hand, where a governmental agency has been sued directly for facilitating racial discrimination, this Court has ruled that there need be "no precise causal relationship" between the state involvement and the capacity of the private entity to engage in discrimination. *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973). All that is required is that there be some "significant tendency to facilitate, reinforce, and support private discrimination." *Id.* at 466. *See also Lombard v. Louisiana*, 373 U.S. 267 (1963); *Peterson v. Greenville*, 373 U.S. 244 (1963); *Turner*

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[58] Thus, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the Court was called upon to decide whether governmental involvement in the activities of a private social club located in a private building was sufficient to warrant impinging upon the associational rights of the members of the club. In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), there were a great variety of enterprises subject to the same regulatory scheme as electric utilities. Imposing constitutional obligations on electric utilities also presumably would have meant that "the actions of a lone Philadelphia cab driver could also be fairly treated as those of the State of Pennsylvania" (*id.* at 350 n.7). Here there would be no such anomaly; the companies involved are large enterprises whose regulations results from their effect upon interstate commerce. In addition, there is little reason to fear that the industry will be seriously burdened by a vigorous requirement of equal opportunity, unlike the burden that would have fallen on utilities in *Jackson v. Metropolitan Edison Company, supra*, if they were required to have elaborate service termination proceedings. Here the industry regulated is already subject to a network of nondiscrimination laws. Requiring the FPC to recognize its constitutional responsibilities would add to the burdens of the gas and electric utility industry only to the extent that compliance with the national policy against discrimination would be more certainly assured.

v. City of Memphis, 369 U.S. 350 (1962); *McCabe v. A., T. & S.F. Ry. Co.*, 235 U.S. 151 (1914); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974).[59]

B. The FPC's Involvement With Private Utilities Facilitates, Reinforces and Supports Discrimination.

As we have shown, this is not a case which invokes the more rigorous standards of "state action" that are appropriate when the interests at stake are of a nonracial nature or when a more far reaching intrusion in private activity is sought by clothing a private entity with the

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[59] Lower courts also have recognized that there is a need to distinguish between the governments' duties and responsibilities with respect to discrimination and those of private entities. *See Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom., Coit v. Green*, 404 U.S. 997 (1971); *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970) (preliminary injunction), *appeal dismissed*, 398 U.S. 956 (1970), 400 U.S. 986 (1971); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972). Contrary to the claim of the FPC (Pet. Br. 34-36), the court's decision in *Green v. Kennedy* that the Treasury Department was prohibited from affording tax benefits to private segregated schools was not grounded on a finding of "state action" with respect to the private schools. This was made clear in the court's decision on the merits (*Green v. Connally, supra* at 1164). Under IRS's 1970 construction of the Internal Revenue Code, referenced by that court (Rev. Rul. 71-1447, 1971-72 Cum. Bul. 230-31), the IRS ruled that tax exempt status would be denied to all private schools that do not have nondiscriminatory admission policies. No condition was set that the operation of the private school be deemed "state action."

See also Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967), where the state was precluded from contracting with contractors from whose labor forces blacks were banned, without any conclusion that the contractors were engaged in "state action."

mantle of government. Nevertheless, as Chief Justice Burger indicated in *Norwood v. Harrison, supra,* at 465-66, even in cases of the type now before the Court it is necessary to show that governmental involvement has had "a significant tendency to facilitate, reinforce, and support private discrimination." A number of factors present here meet the "significant tendency" test.

1. The insulation of private utility companies from price competition facilitates and supports private discrimination. As we have shown, an employer's decision to engage in racial or sexual discrimination results in a less efficient labor force and adds to the cost of doing business.

The costs of race and sex discrimination have become so patent (see note 17, *supra*) that if utilities were operating in a competitive market, costs alone might induce them to eliminate discriminatory employment practices. But a gas and electric utility industry shielded from competition need not be concerned with reducing costs except insofar as the regulatory agency prevents inefficiently incurred costs from being passed on to the consumer. Protected status, therefore, facilitates and supports the discriminatory practices of the gas and electric utility industry and is a major contributing factor accounting for this industry ranking last in the employment of blacks among the 23 largest industries in America (J.A. 13).

Protected status also immunizes the gas and electric utility industry from the public pressures that frequently are employed to promote equal employment opportunity in other industries. *See* D. Bell, Race, Racism and American Law, Chs. 7, 14 (1973). It may be possible to boycott grapes and lettuce but, absent a fondness for kerosene lamps and pot belly stoves, a boycott of a discriminatory gas or electric company seems hardly likely. Were the gas

and utility industry subject to the normal forces of the marketplace, public pressures might be exerted to affect the industry's employment practices. But the government has facilitated the ability of the industry to discriminate by removing the threat of competition and the economic mechanisms by which public pressure might be exerted.

2. There are unique and special rights and benefits provided under the Federal Power Act and the Natural Gas Act that so deeply involve the government with gas and electric utility companies that it can fairly be said that the government is supporting private discrimination. For example, the court below, in noting a difference between this case and *Jackson v. Metropolitan Edison, Co., supra,* pointed out that some of the FPC's regulatees "are actually situated 'upon . . . the public lands and reservations of the United States.' 16 U.S.C. §797(e)(1970)." Cr. Pet. App. D at 27-28, n.48. Discrimination by such companies inevitably would be viewed as supported by the government. Similarly where, as here, private companies are afforded the power of eminent domain (15 U.S.C. §717f(h); 16 U.S.C. §814)—an historic governmental power—it is plain that governmental involvement has much more than a "significant tendency" to support and reinforce the conduct of these companies. As Mr. Justice Rehnquist noted in *Jackson v. Metropolitan Edison Co., supra* at 352-53: "[i]f we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."

3. Discrimination is supported and reinforced when the FPC, having undertaken a general responsibility to prevent unjust costs from being passed on to consumers, abjures responsibility for dealing with costs attributable to

racial or sex discrimination. It is one thing when the duty invoked on behalf of a group of claimants would, if assumed by the agency, place it in conflict with its duties to the general public. As noted by Mr. Justice Marshall, this might have been the case in *Jackson v. Metropolitan Edison Company, supra*, where the benefits of due process hearings afforded a few customers would have come into conflict with the interests of consumers in general in avoiding undue expenses. *Id.* at 373 (Marshall, J., dissenting). But it is quite another thing for an agency to seek to avoid a duty whose assumption is thoroughly consistent with its general mandate to serve the public. For the FPC to concede as it does that it has general responsibility to prevent unjust costs from being passed on to consumers, but then to exclude from that responsibility costs due to race or sex discrimination, amounts to direct state action of the most discriminatory kind.

For the government to so single out race problems, to treat them differently from related governmental interests, clearly constitutes a suspect racial classification. *Hunter v. Erickson*, 393 U.S. 385 (1969); *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971). The FPC's failure to act, despite overwhelming evidence of the extent of discrimination and its own recognition of the problem,[60] and despite continuous importuning to do

[60] *See Hearings, supra* note 4, where the Chairman of the FPC and other agency officials were questioned about the extent of discrimination in the gas and electric utility industry and what the FPC could do to combat it. See also *Pacific Gas and Electric Company*, 44 FPC 1365, 1368 (1970), where the FPC noted that the "problems of equal opportunity in employment are not matters of first impression to the Commission" and urged "all electric and gas suppliers, whether investor owned, publicly owned or cooperatively owned, to take all measures needed to implement this national policy [that discrimination in employment be eliminated] fully and completely."

so,[61] differs little from the affirmative approval of the practices at issue by the regulatory agency in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952).[62]

[61] In addition to the twelve organizations who petitioned the FPC in this case (note 1, *supra*), the FPC has been requested to act against employment discrimination by a committee of the House of Representatives (House Comm. on the Judiciary, 92d Cong., 2d Sess., Report of the Civil Rights Oversight Subcommittee, "Civil Rights Responsibilities of the Federal Power Commission," (Comm. Print 1972)), by the Chairman of the Equal Employment Opportunity Commission (Cr. Pet. App. D at 4-5) and by the United States Commission on Civil Rights (I Civil Rights Enforcement Effort—1974 233-35 (1974)).

[62] *Cf. Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248, 252 (4th Cir. 1971), where the court refused to equate "administrative silence with abandonment of administrative duty. It is just as sensible to infer that silence means consent, i.e., approval."

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be modified, (a) to require the FPC to issue a rule articulating its basic policy against discrimination and the general procedures to be employed in its implementation and (b) to permit the FPC to consider adoption of all methods of implementation rationally related to its legitimate objectives, and, as modified, affirmed.

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Nos. 73-1614 and 74-1606

In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER,

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

I. EMPLOYMENT DISCRIMINATION IS NOT A RELEVANT CONSIDERATION FOR THE FEDERAL POWER COMMISSION IN CARRYING OUT ITS STATUTORY RESPONSIBILITIES

1. NAACP states that the FPC must consider matters of national policy which are "related to the agency's discharge of its duties." (NAACP Br. p. 17)

212-819—76——1

We do not quarrel with this articulation of the breadth of the "public interest" concept as it applies to the FPC. Nor do we contest that equal employment opportunity is a national policy of some significance. However, despite an array of statutory citations demonstrating the extent to which elimination of employment discrimination is national policy, NAACP cites no legislation directing or permitting the FPC to consider employment discrimination nor otherwise suggesting that the national policy against employment discrimination is one "related to [the FPC's] discharge of its duties."

The public interest concept embedded in the FPC's licensing and certification authority relates to areas within the purview of the statutory objectives. The thrust of those objectives are economic regulation for the benefit of the consumer and for natural resource development. FPC contends it has no authority to consider and to therefore initiate rules defining standards to be met in the area of employment discrimination as a criteria for issuing certificates and licenses.

Cases cited by NAACP for the proposition that the FPC is required to look beyond its own statutes to protect the public interest, involved matters clearly within the ambit of this agency's duties under its own statutes. They related to matters of economic concern or natural resource conservation. *Gulf States Utilities* v. *F.P.C.*, 411 U.S. 747 (1973) involved antitrust considerations. *Udall* v. *F.P.C.*, 387 U.S. 428 (1967), dealt with national conservation policy in the licensing of a hydroelectric power project. As noted by the Court of Ap-

peals below, the Water Power Act, subsequently Part I of the Federal Power Act, 16 U.S.C. 791–823, and pursuant to which the Commission issues hydroelectric licenses, mandates the preservation of water resources (FPC Pet., p. 21a).

That employment discrimination may indirectly come to the FPC's attention, as having been the cause of penalties or having been the cause of a regulatee's inability to properly function, does not authorize the Commission, under the rubric of the public interest, to promulgate regulations proscribing employment discrimination. Contrary to NAACP's statement, the FPC recognizes there are some areas of the discrimination laws which do indirectly relate to the FPC's duties under the Natural Gas Act and the Federal Power Act. As discussed in our opening brief, they involve costs arising from the imposition of penalties from, for instance, employment discrimination, which would, under the Commission's Uniform System of Accounts, be deducted from income. (FPC Brief, pp. 25–27). In this way, regulated utilities may not benefit from actions adjudicated in the appropriate judicial or administrative forum to be contrary to law. But that adjudication, in the first instance, is not a power Congress has granted to this Commission. Even if the results of employment discrimination may have a cost impact, the FPC has not been delegated authority to adjudicate in the first instance whether there exists illegal employment discrimination and to order remedies based upon its findings in matters not related to economic activity.

2. NAACP argues that the FPC must "attach appropriate conditions to licenses and certificates of public convenience and necessity, in order to assure that recipients will act legally and in conformity with the public interest." (NAACP Br., p. 13). It contends that such conditions would prevent the FPC from later having to face either of two "unacceptable alternatives": permitting ratepayers to "absorb the costs of job bias" or imposing those costs upon shareholders" which could impair the company's financial health." (*Ibid.*) NAACP assumes, without foundation, that these costs would not be incurred should the FPC have authority to prescribe additional requirements upon its regulatees duplicative of present laws and regulations of the EEOC and a myriad of other agencies. We have already noted that if costs for employment discrimination were assessed as penalties by other agencies, the FPC would exclude those amounts for ratemaking purposes. Thus, Commission regulations against employment discrimination would add nothing to the present abilities of the FPC to disallow the flow-through to consumers of costs for employment discrimination already finally adjudicated as penalties. Only if the FPC were to adjudicate the issues in the first instance, in place of the EEOC, might there tend to be an impact on discrimination. In any event, the result would merely substitute one agency, not expert in the field, for another which has the expertise, without additional administrative efficiency. But, the allocation of remedial duties among the agencies is a matter for the Congress to decide.

On the other hand, if a regulatee is already willing to permit its shareholders to absorb costs of discrimination, knowing the FPC will not permit it to flow-through to its consumers penalties for discrimination, there is no reason the imposition of Commission Rules on the matter would act as a further deterrent.

Nor are certificate conditions a panacea. The unsatisfactory remedy for violating a condition would be withdrawal of operating authority to the detriment of the customers of the system, or lengthy litigation in the courts pursuant to the general remedial sections of the FPC's statutes providing for criminal penalties. Thus, even with the certificate conditions NAACP seeks, the Commission ultimately could again be faced with the same unacceptable alternatives NAACP presently sees, *i.e.*, whether to permit the consumer to pay costs of job bias or impose the costs on the shareholders to the possible impairment of the company's financial health.

3. NAACP characterizes as "non-remedial" costs resulting from diminished labor productivity and efficiency due to exclusion of a portion of the potential workforce, regardless of qualifications, and demoralizing effects of discrimination (NAACP Br. p. 22–3). NAACP indicates it is "likely" non-remedial costs exceed remedial costs under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 253 (NAACP Br., p. 26). In asking the FPC to prevent such "non-remedial costs" NAACP suggests this Commission should move further, beyond even the Congressional mandate of Title VII, (apparently pursuant to the FPC's own enabling statutes) and ferret out these

"implicit" costs arising from prohibited discrimination, and reduce rates accordingly. Moreover, NAACP suggests that the FPC should attempt to prevent the passing along of these unquantifiable costs although other agencies mandated to act in this area have apparently been unsuccessful in developing a method to quantify or to remedy such discrimination. It argues that, difficulty in quantification does not make "non-remedial" costs any more a proper burden to impose upon consumers (*Id.*, p. 25).

While these costs may be "non-remedial" in the sense that back pay awards and prospective relief are not provided for, even though they are costs incurred by employment discrimination, it does not follow, as NAACP suggests, that the FPC has authority to proscribe the employment discrimination giving rise to those costs. The FPC's statutes, as the Court of Appeals found, do not provide the FPC the authority to consider employment discrimination *per se*.

4. NAACP mischaracterizes FPC's position when it suggests the "FPC contends that Congress has endeavored in the civil rights laws to centralize all government concern with the problems of employment discrimination in a single authority, the Equal Employment Opportunity Commission." (NAACP Br., p. 34). To the contrary, the FPC recognizes other agencies and Departments of the Federal government have been delegated responsibilities in these areas. The FPC contends, however, that while Congress has several times delegated authority to other federal entities, and primarily the EEOC, it has never specifically delegated authority in the area of employment dis-

crimination to the FPC.[1] Nor does NAACP cite any instances where an agency with plenary economic regulatory authority has been given or has been held to have jurisdiction over employment discrimination, either pursuant to its general enabling legislation or existing statutes relating to employment discrimination.

5. NAACP objects that although the FPC recognizes it may disallow costs that are unnecessary or illegitimate, that has "no practical effect since [the FPC] has no regulations and no procedures by which consumers may be protected from these needless expenses." (NAACP Br. p. 28). NAACP's statement indicates it fails to recognize that the many provisions of the Uniform System of Accounts as further applied in rate proceedings and the Commission's regulations with respect to certain expenses, such as exploration and development expenses, serve to provide standards for permissible costs. Moreover, one portion of the issue here is not whether regulations exist that will help determine which costs may be passed on in rates, but whether the FPC may in the first instance determine what activities of its regula-

[1] The Commission in its Opinion No. 623 stated: "As pointed out, *infra*, regulation of this type is the province of a specific number of departments and agencies of the Federal Government, and state agencies." (J.A. 56), and we stated in our brief, "The Commission does not contend no remedies other than Title VII are available for employment discrimination, and the Commission's opinion recited several such remedies (Pet. App. 50a, 54a–57a). Rather the Commission contends that concurrent jurisdiction urged by NAACP has not been given to the Federal Power Commission." (Br. p. 22).

tees constitute employment discrimination and thereafter, having made a determination that employment discrimination has occurred, to disallow costs associated with those amounts and to thereby deny or condition certificates.

6. Cases cited by NAACP do not support its proposition that the language of two rate sections of the Federal Power Act and the Natural Gas Act (Sections 205 and 4, respectively) regarding undue discrimination mandate jurisdiction in the FPC to consider, in the first instance, employment discrimination (NAACP Br. p. 29).[2] Those cases dealt specifically with service discrimination not here in contention and over which the FPC recognizes its plenary powers. The issue before this court was not under consideration in those cases. NAACP's reliance upon those cases which are so far afield from the issue here serves only to emphasize the lack of judicial support for its expansive statutory interpretation. A fair reading of *Boynton* indicates the Court's dicta regarding "discrimination of all kinds" contemplated all kinds of discrimination in service and that discrimination in employment was not within the breadth of its meaning or consideration. The same analysis is also true for the *Mitchell* case.

7. NAACP also goes beyond a strict statutory interpretation argument and discusses pragmatic considerations of FPC jurisdiction over employment discrimi-

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[2] *Boynton* v. *Virginia*, 364 U.S. 454 (1960); *Mitchell* v. *U.S.*, 313 U.S. 80 (1941).

nation. It argues that FPC authority over employment discrimination would be more effective in assuring compliance with employment discrimination laws than existing rules which prohibit the federal government as a consumer, from contracting for goods or services from anyone engaged in employment discrimination (NAACP Br., pp. 33–4). Its contentions do not withstand scrutiny. NAACP suggests conditions on licensing and certification are necessary to assure full compliance with such laws rather than existing remedies (NAACP Br., p. 34). It contends that the government as consumer can better assure compliance with the laws by certificate conditions rather than by not contracting for services. One difficulty in NAACP's suggestion is that the FPC's remedies for a regulatee's failure to abide by the FPC's certificate conditions are no less time consuming than the alternative, posed by NAACP: a suit against the utility by another government entity. The FPC's remedy for failure to abide by conditions would be lengthy administrative proceedings subject to appellate review to the end that certificate authority could be withdrawn, all to the detriment of existing utility consumers served under that certificate authority. If the regulatee is violating the existing laws and regulations against employment discrimination, there is no reason to believe an additional FPC sanction would cause him to cease his discriminatory activity. If revocation of a certificate were the added remedy, all customers might suffer by the loss in service. Existing sanctions do not threaten that harsh result.

II. THE FIFTH AMENDMENT DOES NOT REQUIRE THE FEDERAL POWER COMMISSION TO ACT AFFIRMATIVELY TO PROSCRIBE EMPLOYMENT DISCRIMINATION

NAACP argues that the essential nexus between state acts and racial discrimination is the "significant tendency to facilitate, reinforce, and support private discrimination." (NAACP Br. p. 57). While not incorrect, this statement is an incomplete statement of the applicable legal test. *Green* v. *Kennedy,* for example, is based upon the Court's findings, "that the tax benefits under the Internal Revenue Code mean a substantial and significant support by the Governmnt to the segregated private school pattern."[3] Even in *Norwood* v. *Harrison* (from which NAACP's language comes) this Court stated, "the constitutional infirmity of the Mississippi textbook program is that it significantly aids the organizations and continuation of a segregated system of private schools which * * * may discriminate if they so desire."[4]

Thus, the test for state involvement in private racial discrimination is that the state "aid" must be significant[5] and the aid must further, albeit indirectly, the discrimination. A test which focused solely on the fact of "aid" would, for example, preclude local fire protection of discriminatory private schools such as were involved in *Norwood* and *Green.* Certainly, then, NAACP's statement of the applicable test is deficient.

Once the state of the law as enunciated by this

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[3] 302 F. Supp. at 1134.

[4] 413 U.S. 455 at 467.

[5] On this point, see also *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, quoted in our opening brief, p. 38.

Court is properly expressed, it becomes clear that the Fifth Amendment does not require the FPC to act affirmatively to proscribe discrimination by its regulatees—there is an insufficient nexus between the FPC's actions and alleged discrimination. It is inconsequential that some "benefits" may accrue to entities regulated by the FPC. Unless these "benefits" themselves have a significant tendency to aid private discrimination there is no constitutional duty for the government to cease its aid. The setting of rates or granting of certificates by the FPC has no such tendency to foster private discrimination.

It is therefore respectfully submitted that insofar as the judgment of the court of appeals set aside Opinion Nos. 623 and 623–A of the Federal Power Commission, the judgment should be revised.

Respectfully submitted.

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I authorize the filing of this brief.

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FOR ARGUMENT

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Nos. 74-1608 and 74-1619

In the Supreme Court of the United States

October Term, 1975

The National Association for the Advancement of Colored People, et al., petitioners

v.

Federal Power Commission

Federal Power Commission, petitioner

v.

The National Association for the Advancement of Colored People, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1608

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

No. 74-1619

FEDERAL POWER COMMISSION, PETITIONER

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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1. The United States and the Equal Employment Opportunity Commission are responsible for enforcing Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*, which prohibits discriminatory employment practices. The decision in this case, which involves the authority of the Federal Power Commission to proscribe, or to take ac-

count of, discriminatory employment practices by persons subject to its regulatory jurisdiction, may affect the *amici*'s enforcement responsibilities.

2. We adhere to the view, expressed in our memorandum at the petition stage, that the questions presented in this case were decided correctly by the court of appeals. That court held that Congress did not intend "for the Commission to entertain and to adjudicate individual complaints of employment discrimination by its regulatees, and to impose sanctions unrelated to the performance of its central regulatory purposes" (FPC Pet. App. 24a-25a). But the court also held that the Commission's statutory responsibility to ensure "that no unnecessary or illegitimate costs are passed along to [the] consumer" carries with it the limited authority to take into account, in the discharge of its usual regulatory functions, the "[c]osts incurred by reason of a regulatee's choosing to practice racial discrimination" (*id.* at 25a).

Emphasizing that "[t]he line is always to be drawn between regulation reasonably related to the Commission's central functions," which is permitted, "and regulation of employment discrimination for its own sake," which is prohibited (*id.* at 27a), the court of appeals properly left for the Commission to determine in the first instance on remand the manner in which to approach the problem as part of its normal regulatory functions (*id.* at 26a). The court correctly accorded the Commission latitude in determining what kinds of costs it may meaningfully consider in various regulatory contexts (see *id.* at 25a-26a), how and when to quantify those costs (see *id.* at 26a-27a), and whether to proceed by rulemaking or on a case-by-case basis (see *id.* at 26a-27a, 33a, n. 53).[1]

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[1]The Federal Home Loan Bank Board and the Federal Communications Commission have promulgated regulations governing the equal employment practices of companies subject to their regulatory juris-

3. The disagreement between the parties appears to have narrowed since the petitions for a writ of certiorari were filed. The Commission concedes that it has authority, in the exercise of its rate review functions, to disallow as unjust and unreasonable at least some quantifiable costs attributable to discriminatory employment practices (Br. 8, 12 20, 25, 26). The NAACP apparently has abandoned its contention that the Commission must affirmatively regulate the equal employment practices of the companies subject to its jurisdiction (see Cross-Pet. 9-14); it now argues only that the Commission should be free on remand to consider all appropriate methods of exercising its more limited authority and should be required to issue a rule announcing what its basic policy will be with respect to employment discrimination (Br. 15).

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diction. See 12 C.F.R. 528.7; 47 C.F.R. 21.307, 76.311. The Interstate Commerce Commission and the Civil Aeronautics Board are considering whether to issue rules with respect to the equal employment practices of regulated companies. See 36 Fed. Reg. 10741; 37 Fed. Reg. 15518.

The Securities and Exchange Commission declined to promulgate rules governing equal employment opportunity in the securities industry, in part because it was unable to conclude that broker-dealers' employment practices have any significant relationship to investor protection or fair dealing in securities. Securities Exchange Act Release No. 10597 (January 14, 1974), 39 Fed. Reg. 2809; Securities Exchange Act Release No. 11189 (January 20, 1975). The Commission also declined to require corporations to disclose statistical data describing the racial, sexual, and ethnic composition of their work forces. Securities Act Release No. 5627 (October 14, 1975), 40 Fed. Reg. 51656. It issued a release, however, calling to the attention of corporate registrants the obligation, under the Commission's existing rules, to disclose any pending civil rights litigation that could have a material effect on a registrant's assets. Securities Act Release No. 5170 (July 19, 1971), 36 Fed. Reg. 13989.

The scope of each agency's authority to regulate in this area depends upon the nature of its statutory responsibility. None of the agency determinations or proposals mentioned in this footnote has yet been subject to judicial review.

The principal difference between the parties concerns the scope, not the existence, of the Commission's authority to consider employment discrimination. The dispute is over where "[t]he line is * * * to be drawn between regulation reasonably related to the Commission's central functions, and regulation of employment discrimination for its own sake" (FPC Pet. App. 27a). The Commission argues that to do anything more than disallow adjudicated back pay awards would, as a practical matter, require it "to regulate employment practices" (Br. 9). The NAACP argues that the Commission could properly implement its authority by adopting far-reaching regulatory programs (see Br. 20-34).

In our view, these abstract differences need not be resolved at the present stage of this litigation. If, as the court of appeals held, the Commission has authority to take account of the equal employment practices of the companies within its jurisdiction to the extent that those practices bear upon the Commission's usual regulatory functions, the application of that standard to the various situations hypothesized by the parties should be left in the first instance to the Commission. It should also be for the Commission to decide initially whether the issues are to be dealt with through rulemaking or by adjudication in individual cases.

We therefore respectfully submit that the judgment of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1619

FEDERAL POWER COMMISSION,
Petitioner
v.
THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

No. 74-1608

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Petitioner
v.
FEDERAL POWER COMMISSION

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF NATIONAL BLACK MEDIA COALITION NATIONAL COUNCIL OF LA RAZA CHINESE FOR AFFIRMATIVE ACTION

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE FCC HAS ADOPTED AN APPROACH TO CONSIDERATION OF EMPLOYMENT DISCRIMINATION AS A FACTOR IN ITS PROCEEDINGS TAILORED TO ITS SPECIFIC REGULATORY FUNCTIONS	4
A. Broadcast Licensees	4
B. Other FCC Regulatees	6
II. THE FCC'S CONSIDERATION OF EEO PRACTICES OF ITS LICENSEES IS NOT BURDENSOME OR DUPLICATIVE OF OTHER AGENCIES' EFFORTS	6
A. EEO Consideration is Simplified by the Filing Of an Annual EEO Form	7
B. Employment Complaints Represent A Small Percentage of the Complaints Filed With the Commission	8
1. Individual Complaints of Employment Discrimination	9
2. Complaints Alleging Patterns of Employment Discrimination	10
C. Voluntary Citizen Monitoring of Licensee EEO Practices Reduces the FCC's Burden, and Does Not Lead to Protracted Hearings	11
D. Consideration of EEO Has Not Displaced FCC Personnel or Resources	14
E. The FCC's Efforts Are Not Duplicative Of Those of Other Agencies And the Sanctions It Applies Differ From Those of The Courts or Other Agencies	15

TABLE OF CONTENTS—Continued

Page

III. MEASURABLE GAINS FOR WOMEN AND MINORITIES STEM FROM THE FCC'S EEO REGULATIONS 16

CONCLUSION 19

TABLE OF CITATIONS

Cases:

Bilingual Bicultural Coalition of Mass Media v. FCC, 492 F.2d 656 (D.C. Cir. 1974) 11
FCC v. American Broadcasting Co., Inc., 347 U.S. 284 (1954) 4
Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) 5, 13
Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972) 10

United States Statutes:

47 U.S.C. § 307(a) 4
47 U.S.C. § 307(d) 12
47 U.S.C. § 309(a) 4
47 U.S.C. § 310(b) 4
47 U.S.C. § 502 12
47 U.S.C. § 503 12

Administrative Decisions and Reports:

Alabama Educational Television Commission, 33 FCC 2d 495 (1972) 11
Bob Jones University, 42 FCC 2d 522 (1973) 9
Discriminatory Employment Practices, 34 FCC 2d 186 (1972) 6
Employment Practices by Common Carriers, 24 FCC 2d 725 (1970) 6, 8
Inquiry Into the Employment Policies and Practices of Certain Broadcast Stations Located in Florida, 44 FCC 2d 735 (1974) 12
Leflore Broadcasting Co., Inc., 46 FCC 2d 980 (1974) 11

TABLE OF CITATIONS—Continued

	Page
New Mexico Broadcasting Co., 54 FCC 2d 126 (1975) (Albuquerque, New Mexico)	12
1972 License Renewal Applications for 28 Broadcast Facilities Licensed to the Philadelphia, Pa. Area, 53 FCC 2d 104 (1975)	12
Nondiscrimination in Employment Practices of Broadcast Licensees, 13 FCC 2d 766 (1968)	5, 17
Renewal of Broadcast Licenses, Final Report and Order (Docket No. 19153), 38 Fed. Reg. 28762, 28768 (Oct. 16, 1973)	13
Report and Order Re Nondiscrimination in Employment Practices, 18 FCC 2d 240 (1969)	5
Report and Order Re Nondiscrimination in Employment Practices, 23 FCC 2d 430 (1970)	5
Rust Communications Group, Inc., 53 FCC 2d 355 (1975)	12
Administrative Regulations:	
47 C.F.R. § 0.41(p)	14
47 C.F.R. § 21.307	6
47 C.F.R. § 73.125	5
47 C.F.R. § 73.301	5
47 C.F.R. § 73.599	5
47 C.F.R. § 73.680	5
47 C.F.R. § 73.793	5
47 C.F.R. § 76.13	6
47 C.F.R. § 76.311	6
47 C.F.R. § 76.409	6
Miscellaneous:	
Address of Ashton R. Hardy Before the Oregon Association of Broadcasters, Eugene, Oregon, (November 13, 1975)	18
Testimony of FCC Chairman Richard E. Wiley, Hearings on FCC Deregulation, Subcommittee on Communications, Senate Committee on Commerce, 94th Cong., 1st Sess. (November 11, 1975)	12, 16

TABLE OF CITATIONS—Continued

Page

Testimony of FCC Commissioner Benjamin L. Hooks, Hearings on FCC Deregulation, Subcommittee on Communications, Senate Commerce Committee, 94th Cong., 1st Sess. (November 11, 1975) 19

NAB Comments, FCC Docket 20550, Nondiscrimination in Employment Policies and Practices of Broadcast Licensees (October 14, 1975) 17, 18

Remarks of FCC Commissioner Benjamin L. Hooks, before the National Association of Broadcasters, San Francisco, California (November 24, 1975) 8

Superintendent of Documents, Special Analyses, Budget of the United States Government, Fiscal Year 1976 (1975) 15

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BRIEF AMICUS CURIAE OF NATIONAL BLACK MEDIA COALITION NATIONAL COUNCIL OF LA RAZA CHINESE FOR AFFIRMATIVE ACTION

National Black Media Coalition, National Council of La Raza and Chinese for Affirmative Action ("Amici") submit this brief in support of the position of the National Association for the Advancement of Colored People, et al. ("NAACP") in this matter. Both parties to this action have given their written consent to the filing of this brief pursuant to Supreme Court Rule 42(1). Copies of the letters of consent of the parties have been lodged with the Clerk of the Court.

INTEREST OF AMICI

Amici do not focus directly upon whether the Federal Power Commission ("FPC") possesses the authority to consider, in conjunction with its regulatory function, the employment practices of its regulatees. We assume this legal issue will be adequately briefed by the parties. Instead, amici believe that the practical experience they have gained from their direct and continuing efforts to assist another federal agency, the Federal Communications Commission ("FCC"), in its six-year old program of monitoring equal employment opportunity ("EEO") in the industries it regulates, would be helpful to this Court in evaluating the argument by the FPC that to consider the EEO practices of its regulatees poses an impractical and unworkable burden.

National Black Media Coalition ("NBMC") is a non-profit organization representing 71 local groups throughout the country who work to improve the broadcast service provided to Black citizens in their communities. To this end, NBMC works with national commercial and public broadcasting entities and local broadcast stations, participates in the FCC's regulatory proceedings, and has submitted extensive pleadings to the FCC on EEO.

The National Council of La Raza is a private, non-profit, non-partisan organization whose goals include pro-

viding technical assistance to Spanish-speaking individuals and Hispanic organizations in several priority areas, including equal employment opportunities for disadvantaged and minority groups. It, like NBMC, has participated in regulatory proceedings before the FCC designed to apply and enforce equal employment policies by the licensees.

Chinese for Affirmative Action ("CAA") is a voluntary civil rights organization dedicated to promoting the civil rights and equal employment rights of the Chinese community in the United States, and particularly in the San Francisco Bay Area. CAA, like the other two amici, has been active before the FCC on EEO matters. It is presently appealing the denial by the FCC of its Petition to Deny the renewal of the license for KCBS, San Francisco, California, in which employment discrimination was one of the primary allegations. It has also filed with the FCC comments on the Commission's EEO regulations and guidelines.

SUMMARY OF ARGUMENT

The FPC and its amici exaggerate without justification the burden which exercise of authority to consider the factor of employment discrimination imposes upon an agency and its regulatees. Since 1968, for example, the FCC has considered in its regulatory proceedings the connection between its duties under the Communications Act of 1934 and the EEO practices of its regulatees, first those of its broadcast licensees, and subsequently, in 1970 and 1972, those of its common carrier and cable regulatees.

Experience reveals that the EEO regulations and guidelines promulgated by the FCC 1) have not imposed a substantial burden on FCC licensees, 2) have not forced an unwarranted displacement of FCC personnel and/or

required the expenditure of massive resources, 3) have not duplicated the efforts of other governmental agencies concerned with EEO and 4) have produced demonstrable gains for women and minorities in the field of broadcasting.

Thus, the "impractical burden" argument advanced by the FPC in support of its categorical denial that it possesses any jurisdiction to consider the EEO practices of its regulatees must be rejected as unsupported conjecture.

ARGUMENT

I. THE FCC HAS ADOPTED AN APPROACH TO CONSIDERATION OF EMPLOYMENT DISCRIMINATION AS A FACTOR IN ITS PROCEEDINGS TAILORED TO ITS SPECIFIC REGULATORY FUNCTIONS.

A. Broadcast Licensees.

In order to award, renew or transfer a broadcast license, the FCC must first find that such action would serve the "public interest, convenience and necessity".[1] The license may be denied where an applicant has violated the laws of the United States, which of course include the equal employment opportunity laws.[2]

The FCC also determined, in adopting its EEO policy in 1968, that discriminatory employment practices conflict with the basic regulatory requirement that a broadcast licensee must ascertain the needs and interests of all segments of the community it serves, including its minority citizens, and meet them with responsive, non-

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[1] E.g., 47 U.S.C. §§ 307(a), 309(a), 310(b).

[2] "The 'public interest, convenience and necessity' standard for the issuance of licenses would seem to imply a requirement that the applicant be law-abiding." *FCC* v. *American Broadcasting Co., Inc.*, 347 U.S. 284, 289 n. 7 (1954).

discriminatory programming.[3] The FCC recognized a close connection between a licensee's exclusion of minority citizens from employment and its ability to effectively carry out its ascertainment and programming functions.[4]

In adopting its EEO regulations for broadcast licensees in 1969, the FCC made it clear that it was concerned with "patterns" of discrimination.[5] Accordingly, its regulations require a policy against discrimination and an affirmative action program for each licensee:

> Each station shall establish, maintain, and carry out, a positive, continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice . . . 47 C.F.R. §§ 73.125, 73.301, 73.599, 73.680, and 73.793.

The Commission amended its equal employment regulations in 1970 to require that statistical profiles on employment be filed annually with the Commission by each station with five or more full time employees.[6] This statistical report, the 395 form, is substantially identical to the EEO-1 report, which is submitted by all employers with more than 15 employees to the Equal Employment Opportunity Commission ("EEOC").

It is this form, which most if not all FPC regulatees otherwise complete, that cross petitioners NAACP seek to have filed with the FPC. Filing such a form with

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[3] *Office of Communication of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966).

[4] *Nondiscrimination in Employment Practices of Broadcast Licensees*, 13 FCC 2d 766, 770 (1968).

[5] The Commission recognized that positive actions were needed to cope with "general patterns of discrimination developed out of indifference as much as out of outright bias." *Report and Order Re Nondiscrimination in Employment Practices*, 18 FCC 2d 240, 242 (1969).

[6] *Report and Order Re Nondiscrimination in Employment Practices*, 23 FCC 2d 430, 431 (1970).

the FPC and placing a copy thereof in a public file imposes only very minimal burdens on FPC regulatees.

B. Other FCC Regulatees.

Common Carrier and Cable EEO regulations are similar to the EEO regulations for broadcast licensees.[7] In 1970, when the FCC adopted regulations requiring common carriers to follow nondiscriminatory employment practices, it did so in part on a basis similar to that advanced by the NAACP to the FPC in support of its petition for rulemaking:

> [The common carriers] occupy a privileged status by virtue of their monopoly position in their particular areas, and the public is required to do business with them. This unique public interest role makes it particularly important that they not engage in discriminatory employment practices.[8]

II. THE FCC'S CONSIDERATION OF EEO PRACTICES OF ITS LICENSEES IS NOT BURDENSOME OR DUPLICATIVE OF OTHER AGENCIES' EFFORTS.

Several approaches have been devised by federal agencies to effectuate the national policy that equal employment opportunities be afforded every individual irrespective of race, color, religion, sex or national origin.[9] The

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[7] Common Carrier: 47 C.F.R. § 21.307; Cable: 47 C.F.R. §§ 76.13, 76.311, 76.409.

[8] *Employment Practices by Common Carriers*, 24 FCC 2d 725, 726 (1970). The Commission noted similar grounds, in addition to cable's origination of programming, in adopting its Cable EEO rules in 1972. *Discriminatory Employment Practices*, 34 FCC 2d 186, 190-191 (1972).

[9] The approaches taken by the other agencies range from affirmative action requirements to conciliation attempts. For instance, to implement Executive Order 11246, as amended, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has issued regulations requiring federal contractors to (1) under-

FCC has developed an alternative procedure by which it considers EEO practices as a factor in its own proceedings. Moreover, the Commission had adopted a wide spectrum of alternatives to remedy discriminatory practices which fall short of denial of a license or commencement of a court action.

A. EEO Consideration Is Simplified by the Filing of an Annual EEO Form.

In 1969, the FCC's Renewal and Transfer Division of its Broadcast Bureau began to review applications for license renewal and transfer, as part of its normal processing function, to determine whether broadcast licensees had complied with the FCC's EEO, as well as with its other, regulations. The 1970 requirement that each licensee with five or more full-time employees submit the 395 form annually made this process simpler and more objective for both the Commission and the licensees.

In August, 1972 the FCC implemented a monitoring and review standard whereby any licensee with ten or more full-time employees would receive a letter of inquiry regarding its employment practices if (1) there was either a decline in the number of women employees or there were no women listed between form 395 filing periods; and (2) minorities comprised more than five percent of the population and there was either a de-

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take a "utilization analysis" to evaluate incumbent minority and female representation vis-a-vis the available minority and female work force; (2) implement an affirmative action program for each company facility; and (3) submit an annual report detailing the results of the program. The EEOC, whose thrust is conciliation, has authority to receive complaints of employment discrimination, investigate facts and determine whether there is "reasonable cause" to believe the charge to be true. It may also seek court-ordered remedies through injunction, back pay awards, reinstitution or hiring of employees, or other appropriate equitable relief. As noted *infra*, many FCC regulatees are within the jurisdiction of neither agency.

cline in minority employees or there were no minority employees between form 395 reporting periods.

These two minimal criteria have been, since then, the basic standard used by the Broadcast, as well as the Common Carrier and Cable Bureau, to determine whether additional inquiry is warranted. Under this standard ". . . the Commission during the past three years, has sent out over 600 letters of inquiry to licensees which represents approximately 30 per cent of the licensees which come within the monitoring criteria." [10]

With regard to common carriers, the Commission explained why consideration of EEO practices would not create undue delay or unreasonable administrative burdens:

> We have considered this problem and have drafted our rules so as to minimize any additional burden to the Commission. Our annual employment reports are designed to be subdivided into computerized data which can then be programmed for retrieval, to provide a variety of "profile" statistics regarding utilization of minority group and female employees within each company or the industry as a whole. Use of this computerized data will relieve the administrative burden which might otherwise result from processing such annual employment reports.[11]

B. Employment Complaints Represent A Small Percentage of the Complaints Filed With the Commission.

Outside the FCC's own monitoring standard described above, complaints of employment discrimination come

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[10] Remarks of FCC Commissioner Benjamin L. Hooks, before the National Association of Broadcasters, San Francisco, California (November 24, 1975).

[11] *Employment Practices by Common Carriers, supra* note 8, 24 FCC 2d at 727.

to the FCC typically in the form of a letter alleging an individual complaint or in a "Petition to Deny" a license alleging a pattern of discriminatory employment practices. The mechanism by which the two are handled is quite different, although neither method poses a burden to the FCC or its licensees.

1. ***Individual Complaints of Employment Discrimination.***

An individual complaint of discrimination is referred to the FCC's Complaints and Compliance Division. If the letter alleges discrimination in very vague terms, the complainant is asked for more specific information. If the complainant fails to send more specific information, no further action is taken. If the complainant gives sufficient information on which to substantiate the allegation of discrimination, that letter is followed by a letter to the respondent licensee who is asked to comment. Under normal circumstances, the letter is referred to the EEOC or an appropriate state or local agency.

The FCC Complaints and Compliance Division conducts an independent field investigation *only* in the following situations:

(1) The EEOC does not have jurisdiction *and* the complaint presents a substantial question of fact and the complainant has exhausted state and local remedies;

(2) There is a particularly egregious violation; [12]

(3) EEO violations are one of several issues for which the licensee is under investigation.

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[12] *See, e.g., Bob Jones University*, 42 FCC 2d 522 (1973).

In the past six years, the Complaints and Compliance Division has undertaken only 12 field investigations of employment discrimination.[13]

In 1974, 96,710 "complaints, comments and inquiries" were sent to the FCC, of which only 299 concerned employment discrimination.[14] Thus, only a very small percentage of complaints handled by the Complaints and Compliance Division are EEO related.[15] *The FCC has not, therefore, been inundated with employment discrimination complaints as a result of its adoption of rules with respect to EEO.* This conclusion is particularly important to demonstrate how unsubstantiated is the FPC "impractical burden" argument.

2. *Complaints Alleging Patterns of Employment Discrimination.*

Where it is alleged in a "Petition to Deny" that the licensee is engaged in a "pattern" of employment discrimination, the Renewal and Transfer Division reviews the license application to determine if it comports with the standard approved by the U.S. Court of Appeals for the District of Columbia Circuit in *Stone* v. *FCC*, 466 F.2d 316 (1972), i.e., does the licensee's employment profile come within a "zone of reasonableness,"

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[13] About 50 field investigations are done each year for violation of all FCC rules. This and the following information were supplied to counsel for amici by the FCC.

[14] Discrimination based on race, color, or national origin:

AM	89
FM	45
TV	75

Discrimination based on sex:

AM	39
FM	19
TV	32

[15] Of the 96,710 "complaints, comments and inquiries," 12,000 were related to sex in programming, 9,000 concerned crime and violence; 5,700 concerned program changes, preemptions, etc.; and 7,000 concerned news distortion.

particularly in light of the licensee's affirmative action program?

The D.C. Circuit again in 1974 approved the FCC's policy of not holding a full evidentiary hearing unless facts were alleged showing both (1) a statistical disparity between the percentage of minorities or women in the local community and (2) the absence of an active policy of including minorities and women within the licensee's recruitment, training and promotion efforts. *Bilingual Bicultural Coalition of Mass Media* v. *FCC*, 492 F.2d 656 (1974).

Where the FCC has considered allegations of a pattern of employment discrimination it has invariably done so solely on the filed papers. And not once since it began considering charges of a pattern of employment discrimination has the FCC designated a hearing solely on that issue alone. Hence the FPC's fears that it would have to hold a myriad of EEO hearings are unwarranted.

C. Voluntary Citizen Monitoring of Licensee EEO Practices Reduces the FCC's Burden, And Does Not Lead to Protracted Hearings.

The hypothetical "impractical burden" alleged by the FPC is considerably lessened if it were, like the FCC, to rely on individual citizens or citizen groups with specific and personal knowledge of discriminatory employment practices to bring those practices to the attention of the FPC.

Since 1969, numerous "Petitions to Deny" have been filed against licensing applications by citizens groups, many of which brought to the FCC specific information about employment discrimination. Of those, only four have been designated for full evidentiary hearing.[16]

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[16] *Alabama Educational Television Commission*, 33 FCC 2d 495, 513 (1972); *Leflore Broadcasting Co., Inc.*, 46 FCC 2d 980 (1974)

The primary reason why protracted licensing hearings are so seldom necessary is that there are a broad range of more focused regulatory tools available to the FCC to deal with complaints of patterns of discrimination. On the basis of such complaints from the local community the FCC can impose fines,[17] renew the license for less than the full three year term[18] (during which the licensee would be subject to monitoring and review procedures with respect to its employment practices), or renew licenses conditionally and require the licensee to submit a list of community sources for job referrals for minorities and women and to report periodically on the results of recruitment efforts.[19] The FCC has also placed some licensees on "deferred" status until it received more detailed information as to their employment profile and affirmative action efforts.[20]

According to FCC Chairman Richard E. Wiley, 163 licenses have been conditionally renewed since 1972.[21] Many of the cases involving deferral or conditional or

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(Greenwood, Mississippi); *Rust Communications Group, Inc.*, 53 FCC 2d 355 (1975) (Rochester, New York); *New Mexico Broadcasting Co.*, 54 FCC 2d 126 (1975) (Albuquerque, New Mexico).

[17] 47 U.S.C. §§ 502, 503.

[18] 47 U.S.C. § 307(d). See *Bob Jones University, Inc., supra* note 12, 42 FCC 2d at 525.

[19] See, e.g., *Inquiry Into the Employment Policies and Practices of Certain Broadcast Stations Located in Florida*, 44 FCC 2d 735 (1974).

[20] See, e.g., *1972 License Renewal Applicants for 28 Broadcast Facilities Licensed to the Philadelphia, Pa. Area*, 53 FCC 2d 104 (1975).

[21] Testimony of Richard E. Wiley, Hearings on FCC Deregulation, Subcommittee on Communications, Senate Committee on Commerce, 94th Cong. 1st Sess. 14 (Nov. 11, 1975) ("FCC Deregulation Hearings").

short-term renewal have resulted from information brought to the FCC by local citizen groups.

Citizen group participation in the renewal process has therefore not raised frivolous claims, nor has it "impaired" the FCC's ability to carry out its regulatory function.[22]

It is only reasonable to assume that the FPC, were it to adopt some procedure for considering employment discrimination, would have equally few full-scale hearings at which EEO would be a factor.

Moreover, the almost prohibitively high cost of participating in an agency regulatory process also works to ensure that the FPC will not be deluged, as it seems to believe, by hordes of individuals or groups claiming that a regulatee is a demonstrated discriminator. As the District of Columbia Circuit noted in *Office of Communication of the United Church of Christ* v. *FCC*, 359 F.2d 994, 1005 (1966) only those "willing to shoulder the burdensome and costly processes of intervention in a Commission proceeding are likely to be the . . . ones 'having a sufficient interest' to challenge a renewal application."

Finally, many violations of the FCC's EEO regulations never even reach the FCC because of efforts between citizen groups and licensees to work together to eliminate the objected to employment practices. Yet such meaningful dialogue on employment practices would not be possible were the FCC to state categorically, as the

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[22] In fact, the FCC in 1973 amended its rules by changing the deadline for filing license renewal applications from 90 days prior to expiration to four months before that date in order to ". . . provide community groups interested in the performance of local stations with ample time to examine renewal applications, to discuss any problems with licensees, and, if desired, to file timely petitions to deny." *Renewal of Broadcast Licenses, Final Report and Order* (Docket 19153), 38 Fed. Reg. 28761, 28768 (October 16, 1973).

FPC has done, that allegations that a licensee is a discriminator are irrelevant to its regulatory function.

There is no reason to assume that similar salutary effects would not also result from discussions between a FPC regulatee and those it serves. Yet should this Court vindicate the FPC's assertion that it lacks jurisdiction to consider the costs of discriminatory practices and that even the most egregious patterns of employment discrimination have no bearing whatsoever on its regulatory functions, regulatees who are demonstrated discriminators will have little incentive to self-reform.

D. Consideration of EEO Has Not Displaced FCC Personnel or Resources.

In 1973, the FCC established an Industry EEO Unit in the General Counsel's Office.[23] The FCC also has EEO processing units in the Broadcast, Common Carrier and Cable Television Bureaus. Total staffing for these four units is six. The Industry EEO Unit has two EEO experts. The Broadcast Bureau has three EEO specialists and the Common Carrier Bureau one (the Cable Bureau does not have a specific EEO specialist). These individuals came to the FCC with backgrounds in EEO from working with federal and/or State and local EEO agencies that provide a large pool of expertise in this field.

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[23] The function of the FCC Industry EEO Unit is to develop and administer in coordination with the Broadcast, Cable Television and Common Carrier Bureaus, an EEO program for industries regulated by those Bureaus; to assure consistency of EEO plans and their success in achieving the objectives of the program; to recommend such changes in the program as may be appropriate; and to maintain liaison with those who are subject to EEO plans and with State and local agencies, community groups, and industry associations which are concerned with the provision of EEO. See 47 C.F.R. § 0.41(p).

The FCC projects spending a total of only $400,000 on its total EEO staff and review functions in Fiscal Year 1976, less than 1% of its total budget.[24]

E. The FCC's Efforts Are Not Duplicative Of Those of Other Agencies And the Sanctions It Applies Differ From Those of The Courts or Other Agencies.

In commenting in the FCC's first rulemaking proceeding on EEO in 1968 the Justice Department explained why the FCC efforts would not duplicate the efforts of the EEOC:

> Title VII was not intended to circumscribe the authority of the Federal agencies other than the Equal Employment Opportunity Commission to regulate employment practices . . . EEOC's primary function is to attempt to conciliate complaints of alleged discrimination. It has no cease-and-desist power, its investigative resources are very limited, and it has a large backlog of complaints which it has not yet been able to investigate.[25]

While the Congress gave the EEOC greater enforcement authority in 1972, the EEOC still has no jurisdiction over employers with fewer than 15 employees. Approximately 80% of the FCC's broadcast licensees have 14 or fewer employees. Moreover, there is still an enormous back-log at the EEOC.

As shown above, the FCC possesses many alternative regulatory tools for dealing with employment discrimination as a factor in its own proceedings not available to the EEOC. Assuming a citizen group were able to convince the FPC that the regulatee was a demonstrated discriminator in its employment regulations, the sole

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[24] Superintendent of Documents, *Special Analyses, Budget of the United States Government*, Fiscal Year 1976, at 214 (1975).

[25] *Nondiscrimination in Employment Practices of Broadcast Licensees, supra* note 4, 13 FCC 2d at 776-77.

remedy is not, as the FPC seems to envision, denial of the rate increase or of the license application. Clearly there are less draconian remedies available.

For instance, the FPC could disallow that portion of the costs associated with the employment discrimination. Or if the discrimination were found in connection with an application for a license, the Commission could request that the applicant undertake certain steps to eliminate the discrimination. This could include suggesting the applicant increase recruiting efforts at schools with significant minority populations, and asking for additional periodic reporting on its EEO efforts, as the FCC does.

III. MEASURABLE GAINS FOR WOMEN AND MINORITIES STEM FROM THE FCC'S EEO REGULATIONS.

The Civil Rights Act of 1964 enunciated the national policy against employment discrimination. Between 1964 and 1969 there was no significant increase in minority and female employment by FCC licensees. However, with the promulgation of the FCC rules in 1969 there was a marked improvement in the employment profiles of its regulatees. Even prior to a coordinated review mechanism being set up and separately staffed at the FCC in 1973, there was a positive change. Therefore, mere promulgation of the rules was an impetus to FCC licensees and permittees to afford equal employment opportunities.

Chairman Wiley has stated that FCC "efforts in this [EEO] area have contributed . . . to a clear improvement of minority and female employment." [26] The statistics compiled by the FCC of minority and female employment in the broadcasting industry from 1971 (the

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[26] Testimony, *FCC Deregulation Hearings, supra* note 21, at 14.

first year for which data has been compiled) to 1974, released in April, 1975 (see Appendix A), support the inference of a slow, steady increase on an overall industry basis.

The sentiment expressed by Chairman Wiley has been echoed by the National Association of Broadcasters (NAB), the principal trade association of radio and television broadcasters and networks:

> The NAB shares the Commission's desire to eliminate all employment practices, be they active or passive, which discriminates [sic] on the basis of race, color, religion, sex or national origin . . . NAB believes the Commission, under the Communications Act of 1934, has the specific obligation to protect the public interest and included therein is the necessary determination that each regulatee has not violated the national policy against employment discrimination.[27]

The broadcasting industry finds even more significance in the statistics for managerial, professional and sales positions than in the overall employment figures. According to the FCC tabulation, while in 1971, of full time officials and managers, only 8.9% were female and 4.6% were minorities, by 1975 those figures had increased to 14.4% and 6.2% respectively. The NAB observed:

> "Also during that short period, professional staff positions had an increase in female and minority full-time employees from 10.1% and 8.0% to 15% and 10.9% respectively. Women in sales increased from 8.5% to 13.9% and minorities in office/clerical increased from 12.7% to 18.7%." [28]

In view of the dismal record of employers in general, and FCC licensees in particular, before and since the

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[27] NAB Comments, FCC Docket 20550, *Nondiscrimination in Employment Policies and Practices of Broadcast Licensees*, p. 1, 7 (October 14, 1975).

[28] *Id.* at 2.

passage of the Civil Rights Act of 1964, it is doubtful that without the FCC EEO rules, women and minorities would, as the NAB puts it, ". . . have come a long way in such a short period of time. . . . Each year, in increasing numbers, females and minorities are participating in all levels of broadcast management." [29]

Another salutary benefit derived from FCC promulgation of rules is that there is now a clearer standard by which an FCC-regulated company can measure its own performance and to which it can turn for guidance. In addition, Ashton R. Hardy, FCC General Counsel, suggests that a further benefit which the EEO rules afford the licensee is:

> . . . a chance to add new talent and new creativity to your [licensee] business and community . . . Discrimination, no matter how subtly practiced, creates an undercurrent of antagonism and bad will in the hearts and minds of those discriminated against and it morally takes something away from those who discriminate.

FCC licensees, he said, should

> . . . consider maintaining nondiscriminatory hiring practices as a moral obligation which all of you owe to your communities, and, more importantly, to yourselves . . . *All you need do is to make sure that women and minorities have an equal opportunity to be hired for such positions when vacancies occur.*[30] (Emphasis added.)

As Commissioner Hooks has so aptly stated, "It is time to get on with the business of providing equal employment opportunity to women and minorities, not only in the communications industry, but in all areas of the

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[29] *Ibid.*

[30] Address of Ashton R. Hardy before the Oregon Association of Broadcasters, Eugene, Oregon (November 13, 1975) at 12-13.

employment sphere. Enough time has been wasted, and enough talent." [31]

CONCLUSION

For the above reasons, amici submit that the contentions of the FPC as to the impractical burdens of the decision below are belied by the six year experience of the FCC in this area. Not only have the EEO regulations not been an "impractical burden", but they have demonstrably benefitted both minorities and women. Moreover, the general public has benefitted as the services provided by the FCC regulatees begin to reflect more closely the population. Finally, the regulated industries themselves have benefitted by a greater utilization of talent available to them on a nondiscriminatory basis. Accordingly, amici urge this Court to adopt the position of the NAACP herein.

Respectfully submitted,

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[31] Testimony of Commissioner Benjamin L. Hooks, FCC Deregulation Hearings, *supra* note 21, at 9.

APPENDIX

APPENDIX A

Federal Communications Commission
NEWS 1919 M Street, N.W. [SEAL]
Washington, D.C. 20554

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April 7, 1975—B

More Women and Minorities in Higher Broadcasting Jobs, FCC Reports

A new FCC tabulation of 1974 employment in the broadcasting industry shows both women and minorities are increasingly represented in higher-pay full-time jobs.

Of the 30,244 full-time women employees, 10,907 or 36 percent are in higher pay categories (including official and manager, professional, technician, sales and skilled craftsmen), and of 13,891 members of minority groups 8,739 or 63 percent are in such full-time jobs.

The new tabulation of full-time employees shows women held 14.4 percent of the "official and manager" positions, 15.0 percent of the "professional" jobs, 13.9 percent of those in "sales", 2.8 percent of "technicians" and 89.3 percent of the "office and clerical" posts.

Minority group persons held 6.2 percent of the positions in the "official and managers" category, 10.9 percent of the "professionals", 6.2 percent of the "sales", 10.7 percent of the "technicians" and 18.7 percent of the "office and clerical".

The report gives the number of full-time employees in nine major job categories who are women and mi-

norities, with breakdowns into categories of Negro, Oriental, American Indian and Spanish-speaking Americans.

There are separate listings for commercial television, commercial radio, noncommercial television and noncommercial radio, including all stations with five or more full-time employees in 1974.

Comparisons also are made with the employment profiles for each of the three previous years in every job category. In addition to the national totals, there are separate tabulations for each state.

The tabulation is available for inspection in the FCC's public reference room (Room 239), at 1919 M Street, N.W., Washington, D.C. The individual radio and television station reports (FCC Form 395) also are available for inspection there.

—FCC—

Attachments

EMPLOYMENT TRENDS IN THE BROADCAST INDUSTRY BY JOB CATEGORY: FULL TIME EMPLOYEES BY SEX AND MINORITY GROUP: 1971-1974

United States
National Totals

Job Category			Total Emplys	Total Female	Total Males	Total Minor	Female Minorities				Male Minorities			
							Negro	Orient	Americ Indian	Spansh Americ	Negro	Orient	Americ Indian	Spansh Americ
Officials & Mgrs	NR	1974	23,333	3,359	19,974	1,447	218	29	25	83	514	91	82	405
	% Total	1974	100.0	14.4	85.6	6.2	0.9	0.1	0.1	0.4	2.2	0.4	0.4	1.7
	% Total	1973	100.0	12.5	87.5	5.7	0.8	0.1	0.1	0.3	2.2	0.3	0.3	1.7
	% Total	1972	100.0	10.2	89.8	5.1	0.5	0.1	0.1	0.2	1.9	0.2	0.4	1.8
	% Total	1971	100.0	8.9	91.1	4.6	0.4	0.1	0.0	0.1	1.8	0.2	0.3	1.7
Professionals	NR	1974	33,071	4,950	28,121	3,611	556	69	27	126	1,762	105	138	828
	% Total	1974	100.0	15.0	85.0	10.9	1.7	0.2	0.1	0.4	5.3	0.3	0.4	2.5
	% Total	1973	100.0	12.9	87.1	10.0	1.3	0.2	0.1	0.3	5.2	0.3	0.3	2.3
	% Total	1972	100.0	9.7	90.3	8.7	0.9	0.1	0.0	0.3	4.7	0.3	0.3	2.1
	% Total	1971	100.0	10.1	89.9	8.0	0.9	0.1	0.0	0.2	4.5	0.2	0.3	1.8
Technicians	NR	1974	23,393	659	22,734	2,507	92	10	8	22	1,359	154	69	798
	% Total	1974	100.0	2.8	97.2	10.7	0.4	0.0	0.0	0.1	5.8	0.7	0.3	3.4
	% Total	1973	100.0	2.1	97.9	9.9	0.2	0.0	0.0	0.1	5.2	0.6	0.4	3.3
	% Total	1972	100.0	1.4	98.6	8.8	0.1	0.0	0.0	0.1	4.4	0.5	0.3	3.3
	% Total	1971	100.0	1.5	98.5	8.1	0.1	0.0	0.0	0.0	3.9	0.5	0.3	3.1
Sales Workers	NR	1974	12,572	1,745	10,827	774	64	19	11	30	376	26	37	211
	% Total	1974	100.0	13.9	86.1	6.2	0.5	0.2	0.1	0.2	3.0	0.2	0.3	1.7
	% Total	1973	100.0	11.3	88.7	6.0	0.4	0.1	0.1	0.2	2.8	0.2	0.4	1.7
	% Total	1972	100.0	8.8	91.2	5.1	0.2	0.1	0.0	0.2	2.4	0.2	0.4	1.6
	% Total	1971	100.0	8.5	91.5	5.1	0.2	0.1	0.1	0.1	2.5	0.2	0.4	1.6
Office/Clerical	NR	1974	21,248	18,985	2,263	3,974	2,144	242	92	804	442	56	15	179
	% Total	1974	100.0	89.3	10.7	18.7	10.1	1.1	0.4	3.8	2.1	0.3	0.1	0.8
	% Total	1973	100.0	89.4	10.6	17.1	9.1	0.9	0.5	3.3	2.1	0.3	0.0	0.8
	% Total	1972	100.0	88.3	11.4	14.5	7.3	0.7	0.4	3.1	2.0	0.1	0.0	0.8
	% Total	1971	100.0	88.3	11.7	12.7	6.5	0.6	0.3	2.5	1.9	0.1	0.0	0.7
Craftsmen	NR	1974	2,874	194	2,680	400	18	1	2	11	211	15	15	126
	% Total	1974	100.0	6.8	93.2	13.9	0.6	0.0	0.1	0.4	7.3	0.6	0.5	4.4
	% Total	1973	100.0	5.3	94.7	12.9	0.6	0.0	0.0	0.2	6.9	0.5	0.5	4.1
	% Total	1972	100.0	5.5	94.5	11.8	0.4	0.0	0.0	0.2	7.0	0.4	0.5	3.2
	% Total	1971	100.0	5.3	94.7	10.8	0.4	0.0	0.0	0.2	6.3	0.4	0.5	2.9

EMPLOYMENT TRENDS IN THE BROADCAST INDUSTRY BY JOB CATEGORY:
FULL TIME EMPLOYEES BY SEX AND MINORITY GROUP:
1971-1974

United States

National Totals

Job Category			Total Emplys	Total Female	Total Males	Total Minor	Female Minorities				Male Minorities			
							Negro	Orient	Americ Indian	Spansh Americ	Negro	Orient	Americ Indian	Spansh Americ
Operatives	NR	1974	1,543	136	1,407	333	16	2	1	5	208	11	8	82
	% Total	1974	100.0	8.8	91.2	21.6	1.0	0.1	0.1	0.3	13.5	0.7	0.5	5.3
	% Total	1973	100.0	7.0	93.0	20.4	0.7	0.1	0.0	0.2	12.8	0.7	0.7	5.2
	% Total	1972	100.0	4.1	95.9	18.3	0.6	0.0	0.0	0.2	11.1	0.5	0.5	5.4
	% Total	1971	100.0	5.4	94.6	15.1	0.4	0.0	0.0	0.2	9.6	0.4	0.3	4.3
Laborers	NR	1974	261	16	245	128	3	0	0	1	90	2	1	31
	% Total	1974	100.0	6.1	93.9	49.0	1.1	0.0	0.0	0.4	34.5	0.8	0.4	11.5
	% Total	1973	100.0	6.0	94.0	44.0	2.1	0.0	0.3	0.6	27.1	0.6	0.6	12.8
	% Total	1972	100.0	10.4	89.6	46.0	4.5	0.0	0.0	1.3	27.2	1.0	0.6	11.3
	% Total	1971	100.0	5.7	94.3	39.5	2.9	0.0	0.0	0.5	25.2	0.7	0.2	10.0
Service	NR	1974	1,291	200	1,091	717	109	0	0	7	507	6	4	84
	% Total	1974	100.0	15.5	84.5	55.5	8.4	0.0	0.0	0.5	39.3	0.5	0.3	6.5
	% Total	1973	100.0	15.7	84.3	54.0	7.3	0.1	0.1	0.7	39.2	0.3	0.2	6.2
	% Total	1972	100.0	15.1	84.9	53.3	6.5	0.0	0.0	0.9	38.9	0.4	0.0	6.6
	% Total	1971	100.0	13.6	86.4	54.1	7.0	0.0	0.1	0.3	40.4	0.4	0.3	5.6
Total All Jobs	NR	1974	119,586	30,244	89,342	13,891	3,220	372	161	1,089	5,469	467	369	2,744
	% Total	1974	100.0	25.3	74.7	11.6	2.7	0.3	0.1	0.9	4.6	0.4	0.3	2.3
	% Total	1973	100.0	24.1	75.9	10.9	2.4	0.3	0.1	0.8	4.5	0.4	0.3	2.2
	% Total	1972	100.0	23.2	76.8	9.8	1.9	0.2	0.1	0.8	4.1	0.3	0.3	2.2
	% Total	1971	100.0	23.3	76.7	9.1	1.7	0.2	0.1	0.6	3.9	0.3	0.3	2.0

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-1619 and 74-1608

THE FEDERAL POWER COMMISSION, *Petitioner,*

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., *Respondents.*

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., *Petitioners,*

v.

THE FEDERAL POWER COMMISSION, *Respondent.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS 2

SUMMARY OF THE ARGUMENT 18

ARGUMENT

The Court of Appeals improperly found jurisdiction in the FPC to consider evidence of employment discrimination without an initial showing of its effects on cost or adequacy of service 19

CONCLUSION 31

TABLE OF AUTHORITIES

CASES:

Alabama Electric Cooperative v. *Securities and Exchange Commission*, 353 F.2d 905 (D.C. Cir. 1965) *cert. denied*, 383 U.S. 968 (1966). 24

Brotherhood of Railroad Trainman v. *Howard*, 343 U.S. 768 (1952). 14

Burlington Truck Lines v. *United States*, 371 U.S. 156 (1962) 30

Calvert Cliffs Coordinating Committee, Inc. v. *Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971) 6

Chemehuevi Tribe of Indians, et al v. *Federal Power Commission*, 420 U.S. 395 (1975) 19

City of Lafayette v. *Securities and Exchange Commission*, 454 F.2d 941 (1971), *aff'd sub nom. Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747 (1973) 24

Crowell v. *Benson*, 285 U.S. 22 (1932) 25

DeFunis v. *Odegaard*, 82 Wash.2d 11, *appeal dismissed*, 414 U.S. 1038 (1973) 15

Emporium Capwell Co. v. *Western Addition Community Organization*, 420 U.S. 50 (1975) 30

Federal Communications Commission v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265 (1949) 20

Federal Trade Commission v. *Klesner*, 280 U.S. 19 (1929) 26

Federal Trade Commission v. *Raladam Co.*, 283 U.S. 643 (1931) 19, 24, 26, 29

Page

Greene County Planning Board v. *Federal Power Commission*, 455 F.2d 412 (2d Cir. 1972) 6-7
National Association for the Advancement of Colored People v. *Federal Power Commission*, 520 F.2d 432 (D.C. Cir. 1975) 2, 4, 5, 11, 14, 15, 20, 21, 28
New York v. *United States*, 331 U.S. 284 (1947) 26
New York Central Securities Co. v. *United States*, 287 U.S. 12 (1932) 24
Ng Fung Ho v. *White*, 259 U.S. 276 (1922) 26
Universal Interpretative Shuttle Corp. v. *Washington Metro. Area Trans. Comm.*, 393 U.S. 186 (1968) .. 30

FEDERAL STATUTORY PROVISIONS:

Administrative Procedure Act, § 7(d), 5 U.S.C. § 556 (d) 25

Equal Employment Opportunity Act (Title VII, Civil Rights Act of 1964)
42 U.S.C. § 2000e 2, 20
42 U.S.C. § 2000e-4(g)(1) 20
42 U.S.C. § 2000e-14 ..... 2, 30

Equal Pay Act
29 U.S.C. § 206(d) 2

Federal Paperwork Commission
P.L. 93-556, 88 Stat. 1789 (1974) 7

Federal Power Act
16 U.S.C. § 791 *et seq.* 20
16 U.S.C. § 797e 3, 21
16 U.S.C. § 799 3
16 U.S.C. § 800a 22
16 U.S.C. § 800b 3
16 U.S.C. § 800c 3
16 U.S.C. § 803a 3
16 U.S.C. § 807 3
16 U.S.C. § 813 3
16 U.S.C. § 817 3
16 U.S.C. § 824 3
16 U.S.C. § 824(a) 22

Page

16 U.S.C. § 824a 3, 22
16 U.S.C. § 824b 3, 23
16 U.S.C. § 824c 3, 23

Natural Gas Act
15 U.S.C. § 717 *et seq.* 20, 23
15 U.S.C. § 717a 23
15 U.S.C. § 717b 23
15 U.S.C. § 717f 23

National Environmental Policy Act of 1969
42 U.S.C. § 4332 (A)-(H) (1970) 3, 6

STATE STATUTORY PROVISIONS:

Alas. Stat. §§ 18.80.010-.300, § 23.10.192 (Supp. 1972) .. 2-3
Ariz. Rev. Stat. Ann. §§ 41-1401-1485 (1974) 3
Cal. Labor Code Ann. §§ 1410-33 (1971) 3
Colo. Rev. Stat. §§ 24-34-301-8 (1973) 3
Conn. Gen. Stat. Ann. §§ 31-126-128 (1960) 3
D.C. Police Regs. art. 47 (1965) 3
Hawaii Rev. Stat. §§ 378-1-38 (1968) 3
Ill. Rev. Stat. ch. 48, §§ 851-67 (1975) 3
Ind. Stat. Ann. §§ 40-2312-2317 (Supp. 1975) 3
Iowa Code Ann. § 601A.6 (1975) 3
Kan. Gen. Stat. Ann. §§ 44-1001-1041 (Supp. 1974) ... 3
Ky. Rev. Stat. ch. 344 (Supp. 1974) 3
Md. Ann. Code art. 49B, §§ 1-30 (Supp. 1975) 3
Mass. Gen. Laws Ann. ch. 151B (1971) 3
Mich. Comp. L. Ann. §§ 423.301-7 (Supp. 1975) 3
Minn. Stat. Ann. §§ 363.01-.13 (1966) 3
Mo. Stat. Ann. §§ 296.010-070 (Supp. 1974) 3
Rev. Stat. Neb. §§ 48-1001-1009 (1972) 3
N.H. Rev. Stat. Ann. §§ 354A-1-13 (Supp. 1974) 3
N.J. Stat. Ann. 10:5-1-30 (Supp. 1974) 3
N.M. Stat. Ann. §§ 4-33-13 (1974) 3
N.Y. Exec. Law §§ 290-301 (McKinney Supp. 1975) .. 3
N.Y. Civil Rights Law § 42, 45 (McKinney 1948) 29
Ohio Rev. Code Ann. §§ 4112.01-.99 (1973) 3
Ore. Rev. Stat. §§ 659.010-.115 and § 659.990 (1973) ... 3
Pa. Stat. Ann. Tit. 43 §§ 951-63 (Purdon Supp. 1975) . 3
R.I. Gen. Laws §§ 28-5-1-39 (1974) 3

Page

Utah Code Ann. § 34-35-1-35-8 (1974) 3
Wash. Rev. Code §§ 49.60.010-.320 (Supp. 1974) 3
W. Va. Code § 5-11-15 (1966) 3
Wis. Stat. Ann. §§ 111.31-37 (Supp. 1973) 3
Wyo. Stat. Ann. § 27-257-264 (Supp. 1975) 3

REGULATIONS:

28 C.F.R. § 1.7(b) (1975), (FPC, Rules of Practice and Procedure) 25

Executive Order No. 11246, 30 Fed. Reg. 12319 (1965) 2

Executive Order No. 11375, 32 Fed. Reg. 14303 (1967) 2

LEGISLATIVE MATERIAL:

H.R. 93-1323, 93rd Cong., 2d Sess. (1974) 7

S. Rept. 93-1323, 93rd Cong., 2d Sess. (1974) 7

H.R. 92-238, 92nd Cong., 2d Sess. (1972) 13, 18

Additional Views on H.R. 7152, No. 914 to Accompany H.R. 7152, 88th Cong., 2d Sess. (1964) 12

S. Rept. No. 872 to Accompany S. 1732, 88th Cong., 2d Sess. (1964) 12

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Hearings on Utility Fuel Adjustment Clauses Before the Sub. Comm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. (1975) 9

Report on Electric Utility Fuel Adjustment Clauses, Subcomm. on Oversight and Investigation of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. (Subcomm. Print 1975) 9

Page

MISCELLANEOUS:

Atomic Energy Commission, 1972 Annual Report to Congress (1973) 6

The Budget of the United States Government, Fiscal Year 1976 (1975) 7

Electrical Week

January 13, 1975 8
February 24, 1975 8
April 7, 1975 8
June 2, 1975 8
July 28, 1975 8

Electrical World, November 1, 1975 9

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Fogel, L. and Engerman, S., *Time on the Cross, the Economics of American Negro Slavery* (1974) ... 17

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 74-1619 and 74-1608

THE FEDERAL POWER COMMISSION, *Petitioner,*

v.

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., *Respondents.*

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., *Petitioners,*

v.

THE FEDERAL POWER COMMISSION, *Respondent.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

In accordance with this Court's Rule 42, Edison Electric Institute has received the written consents of counsel for Petitioners and Respondents to file this

brief *amicus*. Copies of the consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS

Edison Electric Institute ("EEI") is the principal association of electric utility companies, having as its members 198 companies that supply electricity to 77.6% of all the electric service customers in the United States. EEI submits this brief in support of the position taken by the Federal Power Commission ("FPC" or "Commission") in its petition in this Court.

The decision below [1] judicially imposes on the FPC jurisdiction, which it does not possess by statute, to take into account in the performance of its regulatory functions, including licensing and rate review, evidence that an electric utility or other regulated company is a demonstrated discriminator in its employment relations. The Court of Appeals' decision requires that the FPC consider this evidence without a prior showing of the effect of the discrimination upon the cost or adequacy of the utility's services.[2] The addition of this sweeping and duplicative [3] jurisdiction to the ratemak-

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[1] The Opinion of the Court of Appeals is reported at 520 F.2d 432 (D.C. Cir. 1975).

[2] *Id.* at 435, 443-44.

[3] The members of EEI are already subject to extensive Federal regulation with regard to equal employment practices under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970), the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-14 (Supp. July, 1972), the Equal Pay Act, 29 U.S.C. § 206(d) and Executive Orders Nos. 11246, 30 Fed. Reg. 12319 (1965) and 11375, 32 Fed. Reg. 14303 (1967). In addition to the Federal requirements, employment discrimination on grounds of race, color, religion and national origin is prohibited by the statutes of more than thirty states. Alas. Stat. §§ 18.80.010-.300, § 23.10.192 (Supp.

ing,[4] licensing,[5] environmental[6] and other tasks[7] already assigned by Congress to the agency is not only without basis in law but will, as a practical matter, have a crushing impact upon an industry already financially troubled, in significant part as a result of the regulatory delays to which it is already subjected. Moreover,

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1972); Ariz. Rev. Stat. Ann. §§ 41-1401-1485 (1974); Cal. Labor Code Ann. §§ 1410-33 (1971); Colo. Rev. Stat. §§ 24-34-301-8 (1973); Conn. Gen. Stat. Ann. §§ 31-126-128 (1960); D.C. Police Regs. art. 47 (1965); Hawaii Rev. Stat. §§ 378-1-38 (1968); Ill. Rev. Stat. ch. 48, §§ 851-67 (1975); Ind. Stat. Ann. §§ 40-2312-2317 (Supp. 1975); Iowa Code Ann. § 601A.6 (1975); Kan. Gen. Stat. Ann. §§ 44-1001-1041 (Supp. 1974); Ky. Rev. Stat. ch. 344 (Supp. 1974); Md. Ann. Code art. 49B, §§ 1-30 (Supp. 1975); Mass. Gen. Laws Ann. ch. 151B (1971); Mich. Comp. L. Ann. §§ 423.301-7 (Supp. 1975); Minn. Stat. Ann. §§ 363.01-.13 (1966); Mo. Stat. Ann. §§ 296.010-070 (Supp. 1974); Rev. Stat. Neb. §§ 48-1001-1009 (1972); N.H. Rev. Stat. Ann. §§ 354A-1-13 (Supp. 1974); N.J. Stat. Ann. 10:5-1-30 (Supp. 1974); N.M. Stat. Ann. §§ 4-33-13 (1974); N.Y. Exec. Law §§ 290-301 (McKinney Supp. 1975); Ohio Rev. Code Ann. §§ 4112.01-99 (1973); Ore. Rev. Stat. §§ 659.010-.115 and § 659.990 (1973); Pa. Stat. Ann. Tit. 43 §§ 951-63 (Purdon Supp. 1975); R.I. Gen. Laws §§ 28-5-1-39 (1974); Utah Code Ann. § 34-35-1-35-8 (1974); Wash. Rev. Code §§ 49.60.-010.320 (Supp. 1974); W. Va. Code § 5-11-15 (1966); Wis. Stat. Ann. §§ 111.31-37 (Supp. 1973); Wyo. Stat. Ann. § 27-257-264 (Supp. 1975).

[4] 16 U.S.C. §§ 813 and 824 (1970).

[5] *Id.* §§ 797e, 799 and 817.

[6] The National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (A)-(H) (1970).

[7] In addition to the basic ratemaking and licensing functions of the FPC, other regulatory functions in which, under the Court of Appeals' decision, evidence that the regulatee is a demonstrated discriminator in its employment relations will be admissible include interconnection proceedings, 16 U.S.C. § 824a (1970), approval of sales of assets, consolidations and mergers, *id.* § 824b, approval of securities issues, *id.* §§ 813 and 824c, and license renewal and modification proceedings, *id.* §§ 800b and c, 803a and 807.

the holding out of such broad jurisdiction to hear evidence of discrimination by an agency with concededly limited means of effecting its remedy will cruelly deceive injured victims of discrimination who may resort to the FPC for remedies which it is, as a statutory matter, unable to award.

It is first of all important to understand the sweeping scope of the Court of Appeals' finding of jurisdiction in the FPC and, secondly, the narrow and conjectural basis on which the finding of jurisdiction was made. Thereafter, this brief discusses the legal principles which require reversal of the Court of Appeals' decision.

The Decision Below

The basis for the Court of Appeals' decision appears in the following language from the Court's Opinion:

> "We can foresee situations in which consideration by the Commission of a regulatee's discriminatory employment practices, including rules governing the invocation of that consideration, could be reasonably related to the pursuit of the Commission's proper objectives. We therefore conclude that the Commission does have jurisdiction over employment discrimination in the narrower sense described at the outset of the discussion." 520 F.2d at 443-44.

The scope of the jurisdiction found by the Court of Appeals to exist in the FPC—the so-called "jurisdiction . . . in the narrower sense" referred to in the quotation above—is defined in the Court's Opinion as:

> ". . . the power to take into account, in the performance of its regulatory functions, including licensing and rate review, evidence that the regu-

latee is a demonstrated discriminator in its employment relations." *Id.* at 435

The significance of this grant of jurisdiction, coupled with the Court of Appeals' remand to the FPC "for further proceedings consistent with this opinion," *id.* at 447, is best indicated by the complaint made concerning it by the FPC in its Petition for Certiorari in this Court. As the FPC has concluded, this finding of jurisdiction requires the FPC to "consider evidence of employment discrimination by their regulatees in the first instance without any initial demonstrable showing of cost impact or other impact on operations."[8] The finding of cost impact or other impact on operations has, in other words, already been made by the Court of Appeals on the narrow and conjectural basis hereinafter discussed. That finding having been made in this proceeding, the Court of Appeals has conferred jurisdiction on the FPC to consider evidence of employment discrimination, without further preliminaries, in every rulemaking, adjudicatory or other regulatory proceeding hereinafter engaged in by the agency with respect to the electric utility industry or its members.[9]

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[8] Petition for Certiorari in Dkt No. 74-1619, at p. 7.

[9] To be sure, the Court of Appeals has left it to the discretion of the agency whether to proceed by general rulemaking as to the manner in which such evidence may be introduced or to consider such evidence when and as it is offered in case-by-case adjudicatory proceedings. 520 F.2d at 447n. 53. It has, however, mandated the consideration of such evidence in all the various proceedings, by rulemaking or otherwise, in which the FPC exercises jurisdiction over the electric utility industry and its members without further showing as to its relation to the cause under consideration.

The Impact of the Decision Below on the Electric Utility Industry

Thus viewed, it is apparent that the Court of Appeals' finding of jurisdiction in the FPC is as far reaching in its impact on the regulatory processes, not only of the FPC but of every regulatory body authorized to consider the cost and adequacy of service of an industry subject to its regulation, as that accomplished by Congress in enacting the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (A)-(H) (1970) ("NEPA").[10] (The difference, however, between the situation created by the enactment of NEPA and that created by the present case is that the Court of Appeals in the case at bar lacked a statutory basis equivalent to NEPA on which to base its decision.)

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[10] The example of the consequences of the application of NEPA to the regulatory processes of the Atomic Energy Commission ("AEC") is instructive. In *Calvert Cliffs Coordinating Committee, Inc.* v. *Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971), the AEC was directed to revise its rules governing non-radiological environmental issues in the licensing of nuclear facilities to make them consistent with the requirements of NEPA. In its 1972 Annual Report to Congress, the AEC reported that no full-power operating license had been issued since January 1971 and no construction permit since March 1971. As stated by the AEC: "Principal among the factors converging to produce this situation were the broadened environmental protection responsibilities placed on the AEC by legislation, particularly the National Environmental Policy Act (NEPA) as interpreted in the *Calvert Cliffs* court decision of July 23, 1971." Atomic Energy Commission, 1972 Annual Report to Congress: Regulatory Activities, at 3-4 (1973). See Joint Committee on Atomic Energy, Selected Materials on the Calvert Cliffs Decision, Its Origin and Aftermath, 92d Cong., 1st Sess. (Joint Comm. Print 1972).

With respect to the FPC, in one area of its jurisdiction alone, hydroelectric power regulation, the FPC's environmental evaluations required by NEPA and the decision in *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412 (2d Cir.

Quite plainly, if evidence of discrimination in employment becomes as integral a part of the regulatory process as environmental impact considerations have become as a result of the enactment of NEPA, this fact will have a major effect on an industry already financially troubled in significant part as a result of regulatory delays, and on an agency already severely overburdened with work.[11]

1972), is said by the FPC to constitute almost one-half of its actual and projected workloads:

WORKLOADS

	1974 actual	1975 estimate	1976 estimate
License applications	615	620	614
Environmental evaluations	1,026	1,092	1,208
Inspections	854	1,000	1,050
Power site land applications	75	93	93

The Budget of the United States Government Fiscal Year 1976 App., at 888 (1975).

[11] Companies engaged in the production of energy have been recognized by Congress as particular victims of the excessive paper work which results from duplicative regulation—a fact of particular significance in light of the Court of Appeals' almost casual decision that no harm will result from duplicative filings of EEO-1 forms with the FPC and with EEOC. 520 F.2d at 446-47. Thus, S.Rep. No. 93-1323 to accompany H.R. 93-1323 to establish a Commission on Federal Paper Work, which became P.L. 93-556, 88 Stat. 1789 (1974) quotes the Deputy Comptroller General in a communication to the Congress as follows:

> "Examples of data and information collection problems abound. For instance, during a study of data collection in the area we found that there is no central agency in Government responsible for directing or coordinating the collection of energy data, nor is there any agency whose principal responsibility is the analysis of energy data, as such. Yet, the magnitude and scope of energy data collection is enormous. As of March 1973, 15 major Federal agencies were circulating 145 energy-related questionnaires to the States and the private sector. These questionnaires require 11 million responses." 1974 U.S. Code Cong. & Admin. News, Vol. 3, p. 6663.

As noted by the FPC in its most recent annual report, the financial health of the electric utility industry is "the greatest power problem confronting the industry and the Nation."[12] The two principal causes of the problem, the FPC found, were inflation and delays in obtaining regulatory approvals for rate increases.[13] Moreover, the FPC noted that financial problems were especially dominant in the privately owned sector of the industry, and these problems "were reflected in declining profits, inability to secure adequate financing, deferral of new construction and acceptance of lower reserve margins and in some cases, appeals for State aid."[14]

As a result of its financial problems, the electric utility industry has severely contracted its construction program.[15] A survey by National Economics Research Associates found that in 1974 construction cutbacks for financial reasons resulted in utilities reducing their budgets by $21 billion through 1979.[16] Additional construction cutbacks have been made during 1975.[17]

These financial problems have been compounded by the inability of electric utilities to obtain timely in-

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[12] Federal Power Commission, 1974 Annual Report, pt. 1 at p. 9. H.R. Doc. 94-3, 94th Cong., 1st Sess. (1975) ("FPC Annual Report").

[13] *Id.* at 11.

[14] *Id.* at 10-11.

[15] "The electric power industry spends more money each year for construction of new facilities than any other industry." *Id.* at 16.

[16] *Electrical Week*, Jan. 13, 1975, at 5.

[17] See, *e.g.*, *id.* Feb. 24, at 7; April 7, at 8; June 2, at 6; and July 28, 1975, at 6.

creases in their rates to offset increases in their cost of service. This condition is due, in part, to the inability of the FPC and other regulatory commissions to keep up with their workloads.[18] As a result, electric utilities are experiencing ever-widening periods of "regulatory lag" in their ratemaking, licensing and other proceedings before regulatory commissions.[19] Although no formal study of regulatory lag or delay in rate cases appears to have been made,[20] it has been recognized that the most complete data currently available has been compiled by the Edison Electric Institute.[21]

EEI's data is based on reports filed with it by investor-owned electric utilities on the rate proceedings completed in each calendar quarter. EEI has collected this data for the years beginning with 1971. Based on the data received, EEI has determined that the average time lag between the initial filing of an application and the issuance of a final order expe-

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[18] *E.g.*, at the beginning of the FPC's 1974 fiscal year, "704 wholesale electric rate schedules were pending. An additional 2,777 were submitted during the year and the FPC acted on 2,619, leaving 862 pending at the end of June 1974." FPC Annual Report, at 20.

[19] A recent survey of utility professionals disclosed that unreasonable regulatory lag in rates, construction and obtaining permits, is considered by them as one of the most significant problems confronting the industry today. *Electrical World,* Nov. 1, 1975, at 32.

[20] *Hearings on Utility Fuel Adjustment Clauses Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce,* 94th Cong., 1st Sess., ser. 94-19, at 18 (1975).

[21] Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess., Report on Electric Utility Automatic Fuel Adjustment Clauses 27 (Subcomm. Print 1975).

rienced by reporting utilities in rate cases before the FPC and state commissions, respectively, is as follows:

Date of Final Order	FPC		State Commissions	
	Cases Reported	Lag *	Cases Reported	Lag *
1971	3	10.2 months	54	9.5 months
1972	17	11.0 months	83	10.0 months
1973	12	9.1 months	101	10.5 months
1974	8	17.5 months	156	10.5 months
Jan.-June 1975	5	24.4 months	52	8.5 months

* Average

Based on the data available, it would appear that the problem of regulatory lag has recently become significantly more acute in proceedings before the FPC.

Expansion of the FPC's jurisdiction to include issues relating to the employment practices of its regulatees cannot help but contribute further to the delay currently experienced in FPC regulatory proceedings. Any further increase in FPC regulatory lag will only exacerbate the problems confronting the electric utility industry.

The Basis for the Decision Below

Against the broad impact of this far-reaching decision on the regulatory processes of the FPC and other agencies must be placed the narrow and conjectural basis on which the decision is founded. In brief, because the Court of Appeals can "foresee" isolated cases in which discrimination in employment "could be reasonably related" to consideration of the cost and adequacy of service by electric utilities, it has concluded that evidence of discrimination must be received as relevant and admissible in all proceedings

before the FPC.[22] What follows considers the basis for the Court of Appeals' conjectures and the conclusions which may properly be drawn from them.

It is, first of all, worthy of note that the record below contains neither allegation nor proof that discrimination by electric utilities has any effect at all upon the cost and adequacy of the service they provide. What Cross-petitioners sought from the FPC was an across-the-board rule prescribing personnel practices to be followed by utilities, the adjudication of complaints of employment discrimination, and the punishment of infractions of the rules promulgated by the agency. R. 40-47. The authority for this broad request was found by Cross-petitioners in the Fifth Amendment to the United States Constitution and in an expansive definition of the term "public interest" as that phrase appears in the FPC's organic statutes, to include numerous public policies unrelated to cost and adequacy of service supplied by the utilities. An examination of the record below reveals, however, no allegations or proof offered by Cross-petitioners concerning the impact of employment discrimination on those matters concededly within the FPC's jurisdiction, namely, cost and adequacy of service.[23]

In one section of their brief before the Court of Appeals, however, Cross-petitioners expanded their case to support the proposition that, in some instances, discrimination, besides being morally indefensible and

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[22] 520 F.2d at 443-44.

[23] While Cross-petitioners sought reconsideration of the FPC's decision, their Petition for Reconsideration is similarly barren of allegations concerning the economic impact of discrimination. R. 86-92.

therefore within the expanded definition of public interest urged by them, is also undesirable because of alleged adverse economic consequences on the conduct of the regulated industry's business.[24] It was these suggestions in Cross-petitioners' brief before the Court of Appeals that were seized upon by that Court as a basis for the conclusion that evidence of employment discrimination is relevant and admissible in all FPC proceedings.

Even in the Court of Appeals, however, Cross-petitioners could offer no more in support of their proposition concerning the alleged adverse economic consequences of discrimination in employment than general statements concerning the "social costs" of discrimination.[25] But it is obviously a simple play on words to

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[24] Petitioners' Brief in the Court of Appeals, at pp. 28-38.

[25] The statements concerning the cost effects of discrimination at pages 32 through 36 of the NAACP's brief before the Court of Appeals consist, on the one hand, of general statements concerning the "economic waste" of discrimination in a society, *e.g.*, Additional Views on H.R. 7152, House Report No. 914 to accompany H.R. 7152, 1964 U.S. Code Cong. Admin. News, Vol. 2, pp. 2487, 2515; Senate Report No. 872 to accompany S. 1732, 1964 Code Cong. Admin. News, Vol. 2, p. 2355. Such generalized "social costs" of discrimination are, of course, the responsibility of society at large to eliminate and cannot be taxed to the stockholders of public utilities alone by eliminating them from consideration in rate proceedings. On the other hand, the NAACP alluded, as did the Court of Appeals below, to certain isolated cases in which discrimination by specific regulated companies resulted in higher costs to those companies, *e.g.*, an increase in rates for long distance telephone service resulting from alleged employment discrimination against women in the Bell Telephone System. As discussed in the text of this brief, *infra*, these isolated instances in which discrimination in employment by a specific company in a specific labor market resulted in excess costs to that company cannot be expanded into a general proposition that discrimination in employment is in all instances and in all circumstances productive of excess costs to the

assert that, because discrimination in some hypothetical system of cost accounting applied to society at large produces undesirable waste, it therefore produces costs which should not be considered in determining the appropriate rate for electric service in a proceeding before the FPC.[26]

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utility. Moreover, nothing in the position urged by the FPC and EEI on this Court would bar an interested party from litigating such instances of discrimination in employment before the FPC upon an initial showing that the practices were productive of excess costs.

[26] Even if it is within the FPC's jurisdiction to determine what *social* costs are to be passed on to consumers of electric power, it was certainly proper for the FPC to determine in this case that consumers of electric power, as a general proposition, should not be exempted from bearing a burden shared by the rest of society. Moreover, the FPC could properly determine as a jurisdictional matter that whatever benefits might accrue to society from requiring that all social costs of discrimination be borne by the investor owners of utilities are outweighed by the costs to society at large of injecting such issues into FPC proceedings. Thus, the social costs of having the FPC engage in such an effort would have to include those created by the waste of government resources involved in the duplication of effort by multiple agencies of government directed toward the same end and the diversion of the agency's resources from areas in which it has expertise to areas in which it has none. As Congress itself recognized in eliminating a conflict of jurisdiction between EEOC and the Department of Justice in the 1972 amendments to the Civil Rights Act of 1964:

> "Most importantly, persons charged with unfair employment practices should not be answerable to several Federal agencies pursuing separate policies. Multifarious remedies cause undue burden and harassment by a multiplicity of simultaneous or successive procedures. An example is the *Crown Zellerbach Corp* v. *U.S.*, [case 416 F.2d 980 (5th Cir. 1969)] where the union and employer after negotiating a compliance agreement with the Commission were nevertheless subjected to litigation in the Federal court. Next the Office of Federal Contract Compliance entered the picture. Ultimately the Department of Justice filed suit. Such duplication and overlapping proceedings are burdensome and harassing and should be avoided." H.R. 92-238, 1972 U.S. Code Cong. & Admin. News, Vol. 2, p. 2150.

The Court of Appeals in its Opinion attempted to convert these generalized statements of the "social costs" of discrimination into particular cases productive of particular costs which might be appropriate for consideration in a regulatory proceeding. However, the effort by the Court of Appeals was markedly unsuccessful for two reasons: first, because the specific hypothetical situations alluded to by the Court of Appeals as a basis for the general proposition that discrimination is never cost justified must under any realistic analysis be counterbalanced with examples to the contrary; and, secondly, because none of the hypotheticals suggested by the Court of Appeals can be expanded into the general proposition that discrimination always has an adverse impact on cost or adequacy of service. It is that adverse impact which would be necessary to sustain a general rule permitting the introduction of evidence of employment discrimination in all regulatory proceedings conducted by the FPC.

Thus, the Court of Appeals suggested the possibility that a practice of employment discrimination may lead to "strikes, demonstrations and boycotts" aimed at the utility, with a consequent increase in unproductive costs which should not be considered in rate proceedings.[27] However, realism compels recognition of the fact that in many communities obligating the utility to take the lead in eliminating discrimination may also result in "strikes, demonstrations and boycotts" against the utility with consequent unnecessary and unproductive costs. See, *e.g. Brotherhood of Railroad Trainman* v. *Howard*, 343 U.S. 768 (1952). The Court of Appeals' suggestion that all discrimination is economically harmful as a result of the "ex-

[27] 520 F.2d at 444.

cessive labor costs incurred because of the elimination from the prospective work force of those who are discriminated against" [28] must also be viewed in proper perspective. Against this suggestion must be juxtaposed the more realistic proposition that the individual utility must of necessity bear additional costs in order to integrate into its work force those who, on racial grounds or grounds of sex, have traditionally been excluded from the educational institutions in which the skills required by the jobs which the utility offers are acquired. Inefficiency and loss of morale, to which the Court of Appeals also alluded, 520 F.2d at 445, as resulting from discrimination, may also be a necessary consequence of efforts at integration. While these efforts are not to be condemned on the ground that they cannot be cost justified, they do indicate the lack of a basis for a general statement that discrimination necessarily results in excess costs.

Reference was also made by the Court of Appeals to the increased costs of litigation resulting from a policy of discrimination.[29] However, as the "reverse discrimination" case which came before this Court demonstrated, elimination of discrimination too has had its impact in additional litigation costs.[30] Finally, the Court of Appeals reasoned that, because a finding by the EEOC, OFCC or a court that a utility has engaged in employment discrimination may result in back pay awards, legal fees and loss of contracts, the FPC, therefore, has jurisdiction to consider whether a basis exists on which the government agency or a

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[28] 520 F.2d at 445.

[29] *Id.* at 445.

[30] *DeFunis* v. *Odegaard*, 82 Wash. 2d 11, *appeal dismissed*, 414 U.S. 1038 (1973).

court would make such a determination. 520 F.2d at 445. Such reasoning must be rejected, if only because its logical extension would permit the FPC to investigate any matter which might lead to a damage award, loss of contract or expenditure of legal fees. Moreover, the argument must in addition be rejected because until a contract has actually been terminated or back pay and legal fees actually awarded, it is purely speculative and conjectural whether a company's employment practices will have such an effect on its costs. It cannot, in other words, be shown that an employment practice *will* have an effect on company costs simply because it *may* have that effect. Furthermore, even should an assessment be made of damage awards or back pay awards, or a contract terminated or legal fees expended, such sums only affect the company costs subject to FPC consideration if the company chooses to include those sums in its cost of service calculation. Thus, it cannot be said that an expense *will* have an effect on consumer rates simply because it *may* have that effect.

In all events, the general proposition on the basis of which the Court of Appeals found jurisdiction in the FPC—that it is in all cases in the economic self-interest of a utility to eliminate discrimination—will not withstand scrutiny as a factual matter. Indeed, it is dangerously simplistic. For one thing, it ignores the complexity of the problem of eliminating discrimination by suggesting that the "invisible hand" of economic self-interest will by and large correct a social evil which history has demonstrated cannot be dealt with so easily.[31] For another, it exaggerates the ease

[31] The proposition that morally desirable social results are, as a result of the intervention of an "invisible hand," produced by the

with which the social goals embodied in equal employment laws may be accomplished and suggests that they may be achieved as an incidental part of a regulatory process concerned with other social goals without the significant disruptions which EEI foresees will occur.[32]

The point is that while, of course, one may conjure up specific, limited factual circumstances in which pursuit of a policy of discrimination has had adverse economic consequences for a utility,[33] nothing which the Court of Appeals has summoned up can support the only proposition on which the broad finding of jurisdiction made by the Court of Appeals can be based: that discrimination is at all times and in all circumstances unjustifiable on economic grounds.

One further point with reference to the Court of Appeals' decision deserves mention. The FPC's plea, that an initial finding of cost or service impact must be alleged and shown as a jurisdictional fact before evidence of employment discrimination becomes admissible in regulatory proceedings, rings with peculiar poignancy in the light of the complaints of victims of discrimination that they are unable, with any speed or

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pursuit of economic self-interest, Adam Smith, *The Wealth of Nations* 423 (Mod. Lib. Ed. 1937), and its corollary, that despised social institutions are of necessity without economic justification, are today questioned not only on a theoretical basis, P. Samuelson, *Economics*, pp. 39, 476-77, 782 (8th Ed. 1970), but also as a factual proposition. See, R. W. Fogel and S. L. Engerman, *Time on the Cross, the Economics of American Negro Slavery* (1974); Samuelson, *op. cit.* at 780 *et seq.*

[32] *Supra*, at pp. 6-10.

[33] Reversal of the Court of Appeals in this case would in no sense deprive the Cross-petitioners of the right to litigate such cases upon an initial showing of cost impact, when and as they arise in adjudicatory proceedings before the FPC.

conclusiveness, to obtain remedies from the multiple administrative and adjudicatory bodies ostensibly created to deal with discrimination.[34] The rule that jurisdiction is to be determined early in a proceeding not only serves the interest of the tribunal and of the adversary in not being burdened with complaints outside the competence of the tribunal to handle, it also serves the interest of the litigant in avoiding the frustration of discovering, after his complaint has been presented on the record, that the tribunal cannot rectify it. It would be the cruelest deception of victims of employment discrimination to permit them to put on the record before the FPC evidence of underutilization of their race by a utility only to find out that the FPC cannot do anything about it.

From every standpoint—that of the industry, of the agency and of the victims of discrimination—the decision of the Court of Appeals is unwise. What follows discusses the legal principles which show that decision to be without basis in law.

SUMMARY OF ARGUMENT

The jurisdiction of the FPC to consider discriminatory employment practices by its regulatees is limited to those practices which have an adverse impact on the cost or adequacy of service. The Court of Appeals' determination that evidence of such practices is admissable in all FPC proceedings can only be based on a finding by the Court that such practices inevitably and in all cases result in higher costs and deterioration of service.

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[34] See. H. Rep. 92-238, 1972 U.S. Code Cong. & Admin. News at pp. 2139-40.

Cross-petitioners did not offer evidence below to support such a finding and the Court of Appeals did not, and could not, make such a finding itself. Instead, the Court of Appeals' decision is based upon an extrapolation from isolated, hypothetical situations in which discrimination in employment may affect costs. Such limited, hypothetical situations are no substitute for proof of an essential jurisdictional fact. Therefore, the decision of the Court of Appeals must be reversed and the proceeding before the FPC dismissed.

ARGUMENT

The Court of Appeals Improperly Found Jurisdiction in the FPC to Consider Evidence of Employment Discrimination Without an Initial Showing of Its Effects on Cost or Adequacy of Service.

The Federal Power Commission can exert its powers in a jurisdiction neither broader nor narrower than that authorized by Congress. See, *Chemehuevi Tribe of Indians* v. *Federal Power Comm.*, 420 U.S. 395 (1975). Any authority which the Commission may have over the regulation of the employment practices of its regulatees must be found in a specific or necessarily implied statutory grant of power to act in that area. The judiciary may not grant any power to the Commission which Congress itself has not, by statute, delegated to it.

> "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by courts in the proper exercise of their judicial functions." *Federal Trade Comm.* v. *Raladam Co.*, 283 U.S. 643 at 649 (1931).

Both Cross-petitioners and the Court of Appeals recognize that neither the Federal Power Act (16 U.S.C. § 971 *et seq.*), the Natural Gas Act (15 U.S.C. § 717 *et seq.*) nor the Equal Employment Opportunity Act (42 U.S.C. § 2000-e *et seq.*) expressly grants to the Commission jurisdiction over the employment practices of its regulatees.[35] Nevertheless, the Court of Appeals has found that since, in some situations, a regulatees' discriminatory employment practices might affect either the cost or adequacy of a regulatee's service,[36] the Commission cannot decline to hear evidence of such discrimination in any of its rate making, licensing and other adjudicatory proceed-

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[35] Unlike the enforcement provisions of NEPA, the Equal Employment Opportunity Act does not contain any direction for public enforcement, or even consideration of its policies, by any agency other than the EEOC. Any reference in this action to the example of NEPA enforcement by the numerous regulatory agencies is, therefore, inapposite except as a graphic demonstration of the stultifying effect which such enforcement has had upon the fulfillment of the express regulatory functions for which those agencies were created, see fn. 10 *supra*. Moreover, Congress, in enacting Title VII of the Civil Rights Act of 1964, clearly anticipated the possibility of overburdening Federal agencies with responsibilities outside their area of chief concern. Thus, in creating the EEOC, Congress granted it the power only "to cooperate with and, *with their consent*, utilize regional, State, local and other agencies . . ." (42 U.S.C. § 2000e-4(g)(1) [emphasis supplied]). Each agency other than the EEOC was left to determine in its own sound discretion and with due regard to its ability to properly execute its expressly delegated primary functions, whether it could and should effectively direct affirmative compliance programs under Title VII. The courts may not interfere with or direct the exercise of an agency's discretion. *Federal Communications Comm.* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 272 (1949). Nor may the EEOC interfere with or direct the exercise of that discretion.

[36] 520 F.2d at 444.

ings.[37] The Court of Appeals' decision may only be read as an impermissible judicial extension of administrative power beyond the express limits of authority set forth in the acts of Congress under and within which the FPC must operate.

Each grant of authority by Congress to the FPC is expressly linked by statute to a preliminary finding by the Commission that the actions sought to be regulated will have an effect upon the cost or level of service to be provided by its regulatees.[38] Although

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[37] The only substantive section of the Cross-petitioner's "Proposed Rule" expressly disapproved by the Court of Appeals as without the jurisdiction of the Commission was Section 9, which provides that:

> "Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this rule may, by himself or by a representative, file a complaint with the Commission. The provisions of Part I of Subchapter A of Chapter I of Title 18 of the Code of Federal Regulations with respect to the processing of complaints, the conduct of hearings and the issuance of decisions and orders shall apply to complaints filed under this section." (*Id.* at 446, 450).

The Court of Appeals found it to be within the Commission's jurisdiction to adopt "those sections [of the Proposed Rule] providing . . . for intervention and receipt of evidence in Commission proceedings (sections 10 and 11), . . . " *Id.* at 446. Section 10 of the Proposed Rule provides for intervention in adjudicatory proceedings by "any person who believes himself or any specific class of individuals to be subjected to [employment] discrimination . . . ". Section 11 provides that the Commission shall give "material consideration" to information concerning a regulatee's employment practices and affirmative remedial actions with respect to employment discrimination. *Id.* at 450.

[38] Cross-petitioners' argument relies, *inter alia*, upon Section 4(e) of the Federal Power Act (16 U.S.C. § 297[e]) which grants the Commission power to issue licenses for certain improvements, provided that a specific finding be made that the improvements are:

> " . . . *desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for*

there are many areas in which the FPC is expressly enjoined to act in the "public interest" or for the "public convenience and necessity," it is not all con-

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the use or benefit of interstate or foreign commerce." [Emphasis supplied.]

Other sections of the Federal Power Act cited by Cross-petitioners to the lower court include § 7(a) (16 U.S.C. § 800[a]):

> "In issuing preliminary permits . . . or licenses . . . the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, *to conserve and utilize in the public interest the water resources of the region;* and, as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted *to develop, conserve, and utilize in the public interest the water resources of the region,* if it be satisfied as to the ability of the applicant to carry out such plans." [Emphasis supplied.];

§ 201(a) (16 U.S.C. § 824[a]):

> "It is declared that *the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest,* and that *Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest,* such Federal regulation, however, to extend only to those matters, which are not subject to regulation by the States." [Emphasis supplied.];

§ 202 (16 U.S.C. § 824a):

> "*Whenever the Commission, . . . finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons* . . . During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a short-

ceivable public interests which the FPC is directed to pursue, but only those with which it is directly con-

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age of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, . . . *to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest* . . . After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that *the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission.*" [Emphasis supplied.];

§ 203 (16 U.S.C. § 824b):

"The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate *to secure the maintenance of adequate service and coordination in the public interest* of facilities subject to the jurisdiction of the Commission." [Emphasis supplied.];

and § 204 (16 U.S.C. § 824c):

"No public utility shall issue any security, or assume any obligation or liability as guarantor, indorser, surety or otherwise in respect of any security of another person, unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability. The Commission shall make such order *only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service* . . . ."

Each provision of the Natural Gas Act (15 U.S.C. § 717 *et seq.*) relied upon by Cross-petitioners similarly relates the power of the Commission to the "public interest" in providing cost- and service-efficient energy where and when needed. See, 15 U.S.C. §§ 717a, 717b and 717f.

cerned. *New York Central Securities Co.* v. *United States,* 321 U.S. 67 (1944); *Alabama Electric Cooperative, Inc.* v. *SEC,* 353 F.2d 905 (D.C. Cir. 1965), *cert. denied,* 383 U.S. 968 (1966); *City of Lafayette* v. *SEC,* 454 F.2d 941 (1971), *aff'd. sub nom. Gulf States Utilities Co.* v. *FPC,* 411 U.S. 747 (1973). Under such circumstances it was not sufficient for the Court of Appeals simply to find that the elimination of discrimination was in the public interest. The Court had to go further to determine as a jurisdictional fact that the elimination of discrimination would serve that portion of the public interest which the FPC was intended to protect, namely, the public interest in the provision of cheap and adequate power. Cf. *Federal Trade Commission* v. *Raladam Co., supra,* 283 U.S. 643 (1931).

In *Raladam* this Court, although assuming that the respondent's patent medicine was harmful to human life, and that an injunction against its sale would be in the "public interest," nevertheless dismissed a complaint brought by the FTC since the FTC had been unable to find as a fact that respondent was in competition with others, so as to permit an investigation as to whether we had engaged in "unfair methods of competition." "Competition" was a necessary jurisdictional fact under the FTC's empowering legislation, and its existence was a prerequisite to the exercise of the FTC's authority, just as the existence of an adverse effect on cost or service is a prerequisite to the exercise of the FPC's authority in this case. However desirable it might appear at first blush to have all agencies of government pursuing all aspects of the public interest in whatever matters come before them, the considerations of public policy implicit in the concept of limited

jurisdiction required in *Raladam,* and require in this case dismissal of the proceeding in the absence of a preliminary jurisdictional showing.

The determination that discrimination in employment does, in fact, have an adverse effect on either the cost or adequacy of service is "fundamental or 'jurisdictional,' in the sense that [its] existence is a condition precedent to the operation of the statutory scheme." *Crowell* v. *Benson,* 285 U.S. 22, 54 (1932). Moreover, Cross-petitioners, as proponents of the Proposed Rule, have the burden of proving all material facts,[39] including those facts on which are based the Commission's jurisdiction to consider their complaint.[40] The clear and unambiguous requirement of both the Federal Power Act and the Natural Gas Act is that an effect on a regulatee's cost or adequacy of service be found before Commission jurisdiction attaches. Yet in the Commission proceedings Cross-petitioners did not allude to, let alone sustain their burden of proving any such effect. No allegations of cost or service effectiveness were contained in either their initial petition to the Commission or their petition for rehearing.[41]

> "This, therefore, is not a case like *Baltimore & Ohio R. Co.* v. *United States,* 298 U.S. 349, 363, 371-372, where the Commission refused to receive

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[39] Section 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(d): "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

[40] Federal Power Commission, Rules of Practice and Procedure, 18 C.F.R. § 1.7(b): "A petition for the issuance . . . of a rule by the Commission . . . shall set forth the purpose of, and the grounds requiring such rule . . . .".

[41] R. 1-53, 86-92.

> evidence proffered on the point of confiscation. Here, as we have said, the Commission received all evidence that was offered; and when its order was announced and made known and the petition for rehearing was filed, the opportunity to tender additional evidence to bolster the confiscation point was not accepted. As stated in *Manufacturers R. Co* v. *United States,* 246 U.S. 457, 489-490, and in *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 53-54, correct practice requires that, where the opportunity exists, all pertinent evidence bearing on the issues tendered the Commission should be submitted to it in the first instance and should not be received by the District Court as though it were conducting a trial *de novo.* The reason is plain enough. These problems of transportation economics are complicated and involved." *New York v. United States,* 331 U.S. 284, 334-5 (1947).

In the absence of proof of the necessary jurisdictional fact of an adverse cost or service impact the Commission's power, like that of a court of limited jurisdiction, cannot, and has not been activated. See, *Federal Trade Comm.* v. *Raladam Co., supra,* 283 U.S. 643 (1931); *Federal Trade Comm.* v. *Klesner,* 280 U.S. 19 (1929); See also: *Ng Fung Ho* v. *White,* 259 U.S. 276 (1922).

Moreover, even were the Court of Appeals, in reviewing the order of the FPC herein, empowered to open the record and allow the untimely submission of Cross-petitioners' arguments, it is clear that they are unable to sustain the burden of proof placed upon them as proponents of the Proposed Rule. In ten pages of argument to the Court of Appeals devoted exclusively to the alleged economic impact of employment discrimination, the Cross-petitioners were able to state no

more than that employment discrimination, *in general, may have* adverse consequences on commerce, *in general.*[42] As noted above at pp. 12-17, neither Cross-petitioners nor the Court of Appeals were able to go beyond general statements concerning the social costs of discrimination and conjectural speculation concerning individual cases in which discrimination might affect rates and servces.[43]

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[42] Among Cross-petitioners' statements to the Court of Appeals were:

> "The persistence of discrimination in employment in the natural gas and public utility industries *can* lead to serious disruptions in interstate commerce as a result of strikes, boycotts or demonstrations." (Cross-petitioner's Brief in the Court of Appeals, pp. 29-30)
>
> "The FPC cannot close its eyes to these conditions that *could* produce widespread dislocations in the industry it is charged with regulating and promoting." (*Id.* p. 31)
>
> "Speaking *generally*, a Congressional report noted: The failure of our society to extend job opportunities to the Negro is an economic waste . . . ". (*Id.* p. 32, quoting 1964 U.S. Code Cong. & Admin. News, Vol. 2, p. 2487)
>
> " 'Employment discrimination . . . *may* tend to inflate wages, limit the quality of work performance and result in preventing the employer from realizing an optimum return on labor cost expenditures.' " (*Id.* p. 33, quoting Statement of the United States Commissioner on Civil Rights, before the Civil Aeronautics Board, at 3-4 [September 25, 1972])
>
> "A further consequence of employment discrimination *may* be costly law suits and contract termination proceedings . . . Proceedings of this nature, especially *if* in the form of class actions, *could* result in enormous monetary judgments against gas and electric utilities, creating liabilities that *could* significantly affect the costs of companies and thus their rates." (*Id.* p. 35)
>
> [Emphasis supplied]

[43] The Court of Appeals' Opinion is even more explicitly conjectural than Cross-petitioners' brief below. Thus, the Court could state no more in support of the proposition that discrimination in

Mere speculation as to the possible consequences of an indeterminate act will not support an exercise of a limited jurisdiction. In *Federal Trade Commission* v. *Raladam Co., supra,* 283 U.S. 643 (1931) the FTC, although unable to supply evidence of actual use by

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employment will always affect costs than the following, 520 F.2d at 443:

> "*We can foresee* situations in which consideration by the Commission of a regulatee's discriminatory employment practices including rules governing the invocation of that consideration, *could be* reasonably related to the pursuit of the Commission's proper objectives." [Emphasis supplied.]

The Court went on to state, 520 F.2d at 444:

> "The Commission's task in protecting the consumer against exploitation can be alternatively described as the task of seeing that no unnecessary or illegitimate costs are passed along to that consumer. Costs incurred by reason of a regulatee's choosing to practice racial discrimination are within the reach of that responsibility. Without attempting an exhaustive enumeration of such costs, we identify at least the following as indicative of those *arguably* within the Commission's range of concern: (1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because of employment discrimination, [footnote omitted] (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion." [Emphasis supplied.]

As noted, *supra,* at pp. 12-17, the specific and limited situations referred to by the Court of Appeals in the quotation above in no sense support a general proposition that discrimination in employment always adversely affects costs. Three of the situations —those in which discrimination results in strikes, loss of morale, inefficiency and excessive labor costs—obviously turn on particular and limited fact situations which are in no sense of universal application and can be offset by examples to the contrary. See pp.

the defendant of "unfair methods of competition," surmised that it must have been competing, and argued for the propriety of its assertion of jurisdiction. Despite the great public interest presumed to exist in the matter, this Court held that—

> "All this [the existence of competition] was left without proof and remains, at best a matter of conjecture. Something more substantial than that is required as a basis for the exercise of the authority of the Commission." 283 U.S. at 653.

Finally, consideration should be given to the effect of an affirmance of the decision below upon enforcement of the equal employment statutes. Congress has not exempted Commission regulatees from EEOC's jurisdiction. Over thirty states and other governmental subdivisions regulate employment discrimination (see fn. 3, *supra*).[44] The National Labor Relations Board may hear matters of racial discrimination insofar as they relate to the possible commission of unfair labor practices. See, *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50 (1975). Cross-petitioners now wish to add to this formidable

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14-15, *supra*. The other three examples referred to by the Court of Appeals—involving loss of contracts, back pay awards and legal fees resulting from adverse determinations in litigation concerning discrimination in employment—are either of limited application, pertinent only in the case of those utilities against whom a back pay award, for example, has actually been made, or unfairly speculative, based on the unwarranted assumption that every utility subject to the FPC's jurisdiction will be found to have engaged in discriminatory employment practices.

[44] It is instructive to note that New York, for one, has specifically legislated in the area of employment discrimination by public utilities, and has assigned the task of regulation to the State Industrial Commission, *not* the Public Service Commission. N.Y. Civil Rights Law, §§ 42, 45 (McKinney, 1948).

array of regulation an agency whose aims, purposes and statutory directives are certainly not parallel, and may, at times, conflict with those of these other labor and social purpose agencies. It is entirely possible that the FPC, when faced with a problem in employment discrimination, in attempting to balance its actions in that sphere with its primary directive to assure cheap and adequate power, will trespass upon principles firmly established by other agencies. It may, indeed, become impossible for a regulatee to comply with the directives of both the Commission and EEOC. As this Court has said before:

> "We cannot ascribe to Congress a purpose of subjecting the concessionaire to these two separate masters, who show at the outset their inability to agree by their presence on the opposite sides of this law suit." *Universal Interpretative Shuttle Corp.* v. *Washington Metro. Area Trans. Comm.*, 393 U.S. 186, 191 (1968).

In the event of conflicting jurisdictions between two equal administrative bodies, this Court has always deferred to that agency more expert in the subject matter. See, *Burlington Truck Lines* v. *United States*, 371 U.S. 156 (1962). To do otherwise would invited destruction of the Congress' carefully established scheme of distribution of administrative authority.[45] Due regard for that scheme requires this Court to find that it was never intended to place jurisdiction in the FPC to oversee the employment practices of its regulatees.

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[45] Congress, in its 1972 review of Title VII, recognized the inherent difficulties created by overlapping jurisdiction in the equal employment area and established the Equal Employment Opportunities Coordinating Council (42 U.S.C. § 2000e-14). This Council, of which the Chairman of EEOC is a member, together with the Secretary of Labor, the Attorney General, the Chairman of the

CONCLUSION

For the foregoing reasons, this Court should reverse that portion of the decision below construing the jurisdiction of the FPC to include regulatory responsibility over the employment practices of its regulatees and should affirm the dismissal by the FPC of the petition below.

Respectfully submitted,

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Dated: November 28, 1975

United States Civil Service Commission and the Chairman of the United States Civil Rights Commission, is responsible for:

> " . . . developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies." *id.* [Emphasis supplied.]

Contrary to that specific direction, the Court of Appeals' decision *creates* conflict, competition, and duplication among the operations, functions and jurisdiction of the FPC and the EEOC, and threatens, in its implementation, to retard the enforcement of Title VII rights by propagating a mass of conflicting and inconsistent procedural and substantive rulings.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1608

THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION

No. 74-1619

FEDERAL POWER COMMISSION, *Petitioner*

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THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE FEDERAL POWER COMMISSION

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TABLE OF CONTENTS

	Page
THE AMICUS	2
THE INTEREST OF AMICUS	2
ARGUMENT	3
THE COURT OF APPEALS ERRED IN HOLDING THAT THE FPC HAS JURISDICTION TO CONSIDER ALLEGED VIOLATIONS OF EQUAL EMPLOYMENT LEGISLATION AS AN INCIDENT TO ITS AUTHORITY TO DENY RECOVERY OF ILLEGAL OR IMPROPER COSTS	5
A. FPC's Jurisdiction Over Costs Excludes Authority Over the Incurrence of Costs and Relates Only to Pass Through of Costs Incurred	6
B. FPC's Jurisdiction Over Costs Does Not Include Consideration of Whether a Natural Gas Company Is Engaged in Discriminatory Employment Practices	9
C. The Commission Does Not Have the Expertise Required To Pass on Alleged Violations of the Equal Employment Opportunity Legislation	14
CONCLUSION	20

CASES CITED

Mississippi River Fuel Co. v. *F.P.C.*, 163 F.2d 433, 437 (D.C. Cir. 1947)	8
State of Missouri ex rel. Southwestern Bell Telephone Co. v. *Public Service Commission*, 262 U.S. 276, 289 (1923)	7
West Ohio Gas Co. v. *Public Utilities Commission*, 294 U.S. 63, 72 (1935)	8

STATUTES CITED

Page

Equal Opportunity Act of 1972, 42 U.S.C. 2000e 2

Fair Labor Standard Act, 29 U.S.C. 201, *et seq.* 11

Federal Communications Act, 47 U.S.C. 151, *et seq.* .. 11

Federal Power Act, 16 U.S.C. 791, *et seq.* 2

Internal Revenue Code, 26 U.S.C. 1, *et seq.* 11

Labor-Management Relations Act, 29 U.S.C. 141, *et seq.* 11

Labor Management Reporting and Disclosure Act, 29 U.S.C. 401, *et seq.* 11

National Labor Relations Act, 29 U.S.C. 151, *et seq.* .. 11

Natural Gas Act, 15 U.S.C. 717, *et seq.* 2

Section 4(d) 8

Section 5(a) 8

Occupational Safety & Health Act, 29 U.S.C. 651 11

Pipeline Safety Act, 49 U.S.C. 1671, *et seq.* 11

Securities Act, 15 U.S.C. 77a, *et seq.* 11

Securities and Exchange Act, 15 U.S.C. 78a, *et seq.* .. 11

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The Interstate Natural Gas Association of America (INGAA), having obtained the consent of all parties pursuant to Rule 42 of this Court, hereby submits this brief as *amicus curiae* in support of the Federal Power Commission.

THE AMICUS

INGAA is a non-profit association whose members include most of the major interstate natural gas transmission companies subject to the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act, 15 U.S.C. 717, *et seq.* Their operations account for more than 90% of the natural gas transported and sold annually in interstate commerce in the United States. INGAA has participated as an intervenor or *amicus curiae* before this Court and various U.S. Courts of Appeal in matters relating to Commission decisions affecting the natural gas industry. The instant proceedings present issues of industry-wide significance in which INGAA's members are vitally concerned.

THE INTEREST OF AMICUS

The instant proceedings involve questions as to the authority of the Commission with regard to the implementation of the equal employment opportunity legislation, including particularly Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e. These proceedings originated by the filing with the Commission by the National Association for the Advancement of Colored People, *et al.* (NAACP) of a petition seeking the issuance of a rule by the Commission dealing with equal employment opportunities in the electric utility and natural gas industries. Each of these industries is subject to certain regulation by the Commission under the provisions of the Federal Power Act, 16 U.S.C. 791, *et seq.*, and the Natural Gas Act, 15 U.S.C. 717, *et seq.*, respectively.

Upon the appeal filed by the NAACP from the Commission's dismissal for lack of jurisdiction of the NAACP petition, the Court of Appeals rejected NAACP's claim and held the Commission did not have the power necessarily assumed in NAACP's proposed rule to engage in "regulation of employment discrimination for its own sake." (Pet. App., p. 27a).[1] However, the Court also ruled that as an incident to its jurisdiction over the costs of its regulatees, the Commission did have the "power to take into account, in the performance of its regulatory functions, including licensing and rate review, evidences that the regulatee is a demonstrated discriminator in its employment relations." (Pet. App. p. 8a).

It is apparent that INGAA is deeply interested in these holdings of the Court of Appeals insofar as they relate to the natural gas transmission companies subject to Commission regulation under the Natural Gas Act. It is to these facets of the holdings of the Court of Appeals that INGAA addresses this *amicus* brief.[2]

ARGUMENT

In order to place the problem here involved in proper context at the outset, it is appropiate to point out that INGAA, along with various companies constituting its membership, joins in the recognition of the im-

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[1] References to the opinion of the Court of Appeals are to the Appendix to the petition filed by the Commission in No. 74-1619.

[2] The Court's complete discussion of the various materials relevant to NAACP's primary position is wholly dispositive and makes further discussion thereof by INGAA unduly repetitious. Consequently, INGAA limits this brief to the Court's holding that the Commission has authority to consider employment discrimination as part of its authority to disallow illegal or unnecessary costs.

portance accorded by the nation at large to the need to provide equal employment opportunities for all men and women regardless of their race, color, religion or national origin. Further, INGAA understands that substantial progress has been and is being made by the natural gas companies to the end of implementing the salutary objectives of eliminating any such discrimination.

However, the problem here is not concerned with the existence *vel non* of discriminatory employment practices among the natural gas companies.[3] Rather, the question here relates to the method adopted by Congress for the elimination of such discriminatory employment practices as might exist in that segment of the natural gas industry. Specifically the question here is solely a "legal one," whether, and if so to what extent, Congress intended for the Federal Power Commission, *as well as* the agencies specifically designated by Congress, to be responsible for enforcing the equal employment opportunity legislation as far as the natural gas industry is concerned.

The holding of the Court of Appeals that Congress intended for the Federal Power Commission in addition to the agencies specifically designated by it to implement equal employment legislation *vis a vis* natural gas companies through its authority over excessive or

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[3] INGAA notes that the allegations by NAACP are based on a study made in 1970 and 1971, nearly 5 years ago. Much has happened since that time. Moreover, the NAACP statistics do not distinguish between the natural gas companies which operate on the wholesale level, on the one hand, and the distributors of natural gas which operate on the local retail level, on the other, whereas the Commission's jurisdiction in any case, is limited to the wholesale natural gas companies.

improper costs incurred by such companies overlooks the limitations upon the Commission's authority with regard to the allowance *vel non* of a natural gas company's costs. Such holding, if accepted, would greatly expand the Commission's responsibilities far beyond their intended scope and expertise and unduly complicate and prolong the Commission's already complicated and prolonged administrative proceedings.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE FPC HAS JURISDICTION TO CONSIDER ALLEGED VIOLATIONS OF EQUAL EMPLOYMENT LEGISLATION AS AN INCIDENT TO ITS AUTHORITY TO DENY RECOVERY OF ILLEGAL OR IMPROPER COSTS.

As noted earlier herein, the Court of Appeals recognized that Congress did not intend to vest the Federal Power Commission with any direct responsibility in the implementation of equal employment legislation:

> "Congress has not charged the Commission with advancing *all* public interests, but only the public interest in having the particular mandates of the Commission carried out, its interest, in other words, in the conservation of natural resources and the enjoyment of cheap and plentiful electricity and natural gas." (emphasis in original) (Pet. App. p. 19a)

It follows, we submit, that the Commission also does not have jurisdiction to take action with regard to employment discrimination in the so-called "narrower sense" (Pet. App. p. 25a), contemplated by the Court of Appeals.

According to that Court, however, the Commission's jurisdiction extends to all matters "reasonably related to the pursuit of the Commission's proper objectives,"

i.e., as part of its "task of seeing that no unnecessary or illegitimate costs are passed along to [the] consumer" (*Ibid*). Since employment discrimination may affect the costs incurred by a natural gas company, the Court held that it could "foresee situations in which consideration by the Commission of a regulatee's discriminatory employment practices including rules governing the invocation of that consideration could be reasonably related to the pursuit of the Commission's proper objective." (Pet. App. p. 25a). But in so holding, the Court of Appeals not only disregarded the thrust of its own contemporaneous holding but it failed to comprehend the limitations upon the Commission's jurisdiction with regard to the exclusion of "unnecessary or illegitimate costs" from a company's costs of service.[4]

A. FPC's Jurisdiction Over Costs Excludes Authority Over the Incurrence of Costs and Relates Only to Pass Through of Costs Incurred

In contrast to prices charged by a natural gas company for sales subject to the Commission's jurisdiction over which the Natural Gas Act expressly vests the Commission with direct jurisdiction, the Natural Gas Act makes no provision for the Commission's having jurisdiction over the costs incurred by the natural gas company in connection with such sales. Whatever

[4] While the Court held that questions as to the disallowance of illegitimate or unnecessary costs could "arise in any number of different regulatory contexts, including both rate and certificate proceedings" (Pet. App. p. 26a), the fact of the matter is that cost problems in the sense of exclusion from cost of service arise principally, if not exclusively, in rate proceedings. Accordingly, the discussion in the text is framed in terms of rate proceedings, with the understanding that it also extends to certificate proceedings as well where applicable.

authority the Commission has over costs, it is at best indirect and stems from the long-established and well recognized common law principle that in matters pertaining to costs incurred by a regulated enterprise, all costs incurred typically are to be allowed unless clearly shown to have been incurred as a result of impropriety or illegality on the part of management. In the oft-cited case of *State of Missouri ex rel Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U.S. 276, 289 (1923), this Court articulated the rule as follows:

> "* * * It must never be forgotten that, while the State may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in State Public Utilities Commission ex rel. Springfield v. Springfield Gas Electric Co., 291 Ill. 209, 234, 125 N.E. 891, 901:
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> > 'The Commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses, unless there is an abuse of discretion in that regard by the corporate officers.' "

Justice Brandeis set forth the criteria for substituting regulatory judgment for the decisions of management in his concurring opinion in the *State of Missouri* case as follows (*Id* at 289):

> "The term 'prudent investment' is not used in a critical sense. There should not be excluded, from the finding of the base, investment which, under ordinary circumstances, would be deemed rea-

> sonable. The term is applied for the purpose of excluding what might be found dishonest or obviously wasteful or imprudent expenditures. Every investment may be assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown."

See, also *e.g., West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U.S. 63, 72 (1935).

In addition to thus being indirect, the Commission's authority over costs is further restricted not only to costs already incurred but to the disallowance of excessive or improper costs through exclusion from the cost of service used as the basis for determining the company's allowable just and reasonable rates under the Act. Thus, although the Commission fixes rates for the future under Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), and for the future as well as the past under Section 4(d), 15 U.S.C. 717c(d), it historically has based such determinations upon past experience with some adjustment for changes which are expected to occur in the near term future. As stated many years ago in *Mississippi River Fuel Co.* v. *F.P.C.*, 163 F.2d 433, 437 (D.C. Cir. 1947):

> "* * * Expenses (using that term in its broad sense to include not only operating expenses but depreciation and taxes) are facts. They are to be ascertained, not created, by the regulatory authorities. If properly incurred, they must be allowed as part of the composition of the rates. Otherwise, the so-called allowance of a return upon the investment, being an amount over and above expenses, would be a farce."

The Commission's authority with respect to costs, accordingly, does not extend to the incurrence of costs

as such. Unlike its control over rates charged, the Commission has no say or authority over the costs actually incurred by a natural gas company and may neither direct or forbid the incurrence of any actual cost by a natural gas company. The Commission's sole authority is to allow, or to refuse to allow, the company to pass on all or part of the costs incurred by its management in the rates charged to its customers.

Such limited authority with respect to a natural gas company's costs clearly does not extend to the affirmative actions *vis a vis* employment discrimination apparently envisioned by the Court of Appeals (see Pet. App. pp. 25a-26a). In other words, the Commission's authority over costs does not extend to requiring a regulatee to refrain from engaging in discriminatory practices and thereby not to incur the unnecessary or illegitimate costs which may result therefrom. Rather, the Commission is in the situation of being confronted with a *fait accompli* and its only authority extends to disallowing the unnecessary or illegitimate costs incurred by the company resulting from its improperly engaging in employment discrimination.

B. FPC's Jurisdiction Over Costs Does Not Include Consideration of Whether a Natural Gas Company Is Engaged in Discriminatory Employment Practices

The Court of Appeals' holding that since employment discrimination by a natural gas company may result in unnecessary or illegitimate costs to the company, the Commission has jurisdiction over such employment discrimination by virtue of its authority to disallow improper or excess costs is unsound for still another reason. That is that the Court of Appeals jumps from the fact that the Commission has authority to decline to permit a company to recoup unnecessary

or illegitimate costs in rates, to the conclusion that such authority also embraces consideration of whether the company is engaged in practices which could result in such unnecessary or illegitimate costs.

Such reasoning by the Court is a complete *non sequitur*. While the Commission may disallow any illegal or improper costs found to be incurred in connection with employment discrimination, not only does the Commission's authority over costs not extend to the Commission itself making a determination whether or not the company is in fact engaged in employment discrimination, but it would inject the Commission into areas far beyond any in which it has been with respect to the other statutes to which natural gas companies are also subject.[5]

Indeed, in light of the Pandora's box which would be opened if the Commission's limited indirect authority over costs were to be expanded to include consideration of whether the company was in violation of any of the numerous statutes to which it was subject and thereby might incur unnecessary or illegitimate costs, it has long been accepted without question that the line on such Commission authority has to be drawn so as to exclude consideration therefrom of whether the regulatee was engaged in conduct violating the statutes to which it was subject.

Natural gas companies subject to Commission regulation under the Natural Gas Act are also corporate business entities subject to numerous federal and state

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[5] The discussion in the text is directed at statutes which, like the equal employment legislation, are unrelated to the economic objectives of the Natural Gas Act. The situation is, of course, different as to statutes with economic objectives related to those of the Natural Gas Act. See Pet. App. pp. 19a-20a.

laws, as well as the equal employment legislation, which have no relationship to the economic objectives of the Natural Gas Act other than a violation thereof may result in subjecting the company to illegal or improper costs. For example, natural gas companies, like the remainder of the business community, are subject to the Fair Labor Standard Act (29 U.S.C. 201, *et seq.*), the National Labor Relations Act (29 U.S.C. 151, *et seq.*), the Labor-Management Relations Act (29 U.S.C. 141, *et seq.*), the Labor Management Reporting and Disclosure Act (29 U.S.C. 401, *et seq.*), and the Occupational Safety and Health Act (29 U.S.C. 651) to name but a few in the field of federal labor relations alone.

In addition, such companies are subject, *inter alia,* in the federal area to the Securities Act (15 U.S.C. 77a, *et seq.*) and the Securities and Exchange Act (15 U.S.C. 78a, *et seq.*) with regard to the various types of securities issued by them, the Pipeline Safety Act (49 U.S.C. 1671, *et seq.*) with regard to the construction and maintenance of pipeline systems, the Federal Communications Act (47 U.S.C. 151, *et seq.*) with regard to private microwave systems and the various provisions of the Internal Revenue Code (26 U.S.C. 1, *et seq.*) with regard to their reporting income and paying taxes thereon. Finally, of course, such companies are subject to various laws of the states traversed by their pipeline systems, and in the case of some major pipelines, the number of states thus traversed runs into double digits.

Each of the requirements imposed upon natural gas companies by the numerous federal and state statutes in addition to the equal employment opportunity legislation to which they are subject, gives rise to a possi-

bility of violation thereof by a natural gas company. Such violation potentially results in the incurrence of costs which would otherwise not have been incurred at all and such additional costs are subject to disallowance by the Commission from cost of service in fixing the natural gas company's rates. Accordingly, it would follow, under the reasoning adopted by the Court of Appeals, that the Commission's authority over costs under the Natural Gas Act extends as well to determining whether the company has violated any of the various other laws or statutes to which it is subject and hence whether it thereby incurred improper or excessive costs to be disallowed in the company's cost of service for ratemaking purposes.

Since the Court of Appeals' reading of the Commission's authority would thus inject the Commission into consideration of numerous other laws to which natural gas companies, along with other business enterprises, are subject as corporate entities in the business community, it is apparent that such a reading would blow up the Commission's authority over costs from its limited common law scope to embrace most aspects of a natural gas company's compliance with the various federal and state statutes to which it also is subject. Such a result would impose a burden upon the Commission wholly disproportionate to its importance as compared to the Commission's primary responsibility of fixing just and reasonable rates.

To avoid such consequences, it has been accepted by tacit agreement and as a matter of course that the Commission's authority over the costs of a natural gas company does not extend to determining whether the natural gas company violated any of these other laws and

thereby incurred improper or illegal costs. To the contrary, it has been accepted that such determination be made in the first instance by the agency specifically charged by Congress with the primary responsibility for the administration and enforcement of the particular statute involved.

Once such a determination is made, the Commission is in a position to discharge its responsibilities to its ultimate consumers by excluding from the company's cost of service any illegal or unnecessary costs incurred by the company as a result of the violation as determined by the responsible agency. In this way, the responsible agency is able to discharge the responsibilities with which it is directly charged by Congress and as to which it has developed the requisite expertise, on the one hand, and the Commission is able to discharge its responsibilities with regard to rates without injecting itself into areas unrelated to the primary economic objectives of the Natural Gas Act.[6]

By the same token, we submit, the Commission's authority over costs does not extend to determining whether a natural gas company has engaged in discriminatory employment practices and thereby incurred illegal or improper costs subject to disallowance under such Commission authority. As recognized by the Court of Appeals (Pet. App. p. 21a):

> "In * * * specifically legislating in the area of equal employment opportunities, Congress did not

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[6] Although conceptually such an approach permits some situations in which the company may still incur illegal or improper costs which in fact would not be disallowed, such an approach accords with practicalities by recognizing that the additional expenditures in time and money which would be required of the Commission to eliminate all such situations would be wholly out of proportion to the additional benefits to be derived therefrom.

> * * *, in the manner of NEPA, explicitly enjoin every federal agency to concern itself with discrimination; to the contrary, it centralized responsibility for such matters in the Equal Employment Opportunity Commission. * * *"

Consequently, as with other statutes not having any direct nexus to the economic objectives of the Natural Gas Act, determinations as to violations of the equal employment opportunity laws by natural gas companies should be required to be made in the first instance by the agencies in which Congress has centralized responsibility for such matters. Should these agencies determine that a natural gas company violated the equal employment opportunity legislation, it would then be within the Commission's jurisdiction to disallow or exclude any illegal or unnecessary costs incurred by the company as a result of such violation from its cost of service for the purpose of determining its jurisdictional rates.

Patently, therefore, the Court of Appeals was confused as to the nature of the Commission's authority over the costs incurred by a natural gas company subject to its jurisdiction under the Natural Gas Act, with the result that it erred in ruling that as an incident to such authority the Commission could take affirmative actions to prevent discriminatory employment practices by such companies.

C. The Commission Does Not Have the Expertise Required To Pass on Alleged Violations of the Equal Employment Opportunity Legislation

In rejecting the NAACP's claim that the Commission has broad jurisdiction with respect to the implementation of equal employment opportunity legislation,

the Court of Appeals below specifically recognized (Pet. App. p. 9a):

> "* * * Congress may have felt that other significant goals would be inadequately served if the attentions of the agencies set up to pursue them were divided. The Commission's principal task of passing on statutorily specified license and rate applications is prodigious.[5] To perform it, a staff has been built up of specialists in the technical aspects of gas and electric power production and distribution. The unfamiliar problems of employment discrimination regulation might divert an inordinate amount of their energies and skills from the ends to which these are most productively applied.

"[5] The dimensions of the task are suggested by a partial list of applications to, and actions by, the Commission during fiscal 1973: 56 wholesale electric rate increase applications; 11 electric company sale and consolidation applications (all disposed of); 75 electric company securities issuance applications (all disposed of); 116 electric power project license and permit applications (90 disposed of, leaving 529 pending); 215 pipeline rate increase applications; 280 pipeline construction certificate applications (212 disposed of, leaving 214 pending); 6,844 gas producer rate increase applications; 1,383 gas producer certificate applications (955 disposed of, leaving 2,059 pending); 216 gas producer abandonment applications (171 disposed of, leaving 287 pending). FPC, 1973 ANNUAL REPORT 19, 20, 41, 56, 58, 59, 60 (1973)."

However, in holding that the Commission has authority to consider alleged violations of the equal employment opportunity legislation as part of its authority to disallow illegal or excess costs in determining rates for natural gas companies, the Court of Appeals injected issues in Commission proceedings which not only will involve the Commission "staff * * * of specialists in the technical aspects of gas * * * production and distribution" in "unfamiliar problems of employ-

ment discrimination regulations [which] might divert an inordinate amount of [the Commission Staff's] energies and skills * * *" but will extend and prolong the Commission's already extended and prolonged rate proceedings.

For example, notwithstanding the Court's description of the jurisdiction which it held to exist in the Commission to be in the "narrower sense," it is clear that as envisioned by the Court of Appeals, the exercise of such jurisdiction by the Commission would get the Commission into complicated areas which are completely foreign to its expertise. Thus, while holding that the Commission is without jurisdiction to adopt certain of the provisions contained in the rule proposed by NAACP, the Court nevertheless suggested that (Pet. App. p. 31a):

> "* * * those sections providing for the annual filing with the Commission of a form already due the EEOC (section 6) and for intervention and receipt of evidence in Commission proceedings (sections 10 and 11), might well be viewed as orderly methods of bringing to the Commission's attention information which could be relevant to its deliberations in the ways described in Part II of this opinion."

Reference back to Part II of the Court's opinion (Pet. App. p. 25a) discloses the following listing by the Court of costs which it regarded as being "actually within the Commission's range of concern" (*Ibid*):

> "(1) duplicative labor costs incurred in the form of back pay recoveries by employees who have proven that they were discriminatorily denied employment or advancement, (2) the costs of losing valuable government contracts terminated because

> of employment discrimination (footnote omitted), (3) the costs of legal proceedings in either of these two categories, (4) the costs of strikes, demonstrations, and boycotts aimed against regulatees because of employment discrimination, (5) excessive labor costs incurred because of the elimination from the prospective labor force of those who are discriminated against, and (6) the costs of inefficiency among minority employees demoralized by discriminatory barriers to their fair treatment or promotion."

Examination of the costs thus listed indicates, we submit, that evaluation of evidence submitted with regard thereto would inject the Commission and its Staff into areas which are not only far outside their expertise but are extremely difficult of resolution even for those who are directly charged with the enforcement of the equal employment opportunity legislation and who, accordingly, presumably have the requisite expertise.

The Court below itself expressly recognized some of the difficulties inhering in the problems, which its holding called upon the Commission to deal with. For example, immediately following the above listing of various costs potentially subject to disallowance, the Court below expressly observed (Pet. App. p. 26a):

> "Obviously, such costs of employment discrimination range from the very definite and easily ascertainable to the very questionable and virtually unquantifiable."

Further, the Court below noted (Pet. App. p. 27a):

> "There is the potentially quite complex question of which costs associated with employment discrimination litigation will and will not be disallowed."

And again the Court recognized (*Ibid*):

> "The line is always to be drawn between regulation reasonably related to the Commission's actual functions and regulation of employment discrimination for its own sake. The line may well be difficult to draw on occasion. * * *"

Finally, the November 11, 1975 issue of the Wall Street Journal contains an extensive article dealing with the federal contract phase of enforcement of the equal employment opportunity legislation, in which there are highlighted some of the difficulties of reaching agreement encountered by those with direct responsibility therefor as to proper implementation of even this limited phase of the program. As summarized in the Wall Street Journal (p. 1):

> "* * * employers despair of ever receiving clear and consistent regulations explaining their obligations to hire minorities and women. A large manufacturing concern that deals with the Energy Research and Development Administration and the Defense Department complains that it hasn't yet had a government review in which the inspector 'didn't ask for statistics in a form different from that sought by any other reviewing officier.'
>
> "Federal officials snipe at one another for failing to agree on uniform policies for hiring and promotion by private employers. Proposed guidelines for employer testing of employees have been debated for three years by the Labor Department, the Justice Department, the Equal Employment Opportunity Commission and the Civil Service Commission.
>
> "And Congress openly wonders what the federal government is getting for the $39 million it will spend this year policing the hiring practices of

companies and institutions doing business with the government. * * *"

In light of the great difficulties thus being encountered among those with direct responsibility and expertise for the implementation of the equal employment opportunity legislation in reaching agreement as to the appropriate methods to enforce that legislation, it is apparent that the Court of Appeals' holding in effect adding the Commission as another on the list of agencies to have responsibilities with respect to such legislation can only serve to enhance the difficulties already being encountered in reaching agreement as to implementation of the legislation. In addition, since many of the basic problems with regard to that legislation are still undecided and the subject of continuing controversy among the agencies directly responsible, the Court of Appeals' holding would inevitably operate to engender heated controversies with respect to those matters when put in issue in Commission proceedings. The result would be not only to prolong and complicate the Commission's already prolonged and complicated proceedings but also to embroil the Commission in extended litigation before the courts with respect to matters as to which it has little, if any, expertise and as to which it has not been charged by Congress with direct enforcement responsibilities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should set aside the holding of the Court of Appeals that as an incident to its jurisdiction over the costs incurred by natural gas companies subject to regulation under the Natural Gas Act, the Federal Power Commission has authority to consider evidence that such companies have engaged in discriminatory employment practices.

Respectfully submitted,

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